Supreme Court, U.S.
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No.____

IN THE

# Supreme Court of the United States

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SERENA NILES,

*Petitioner*,

v.

GEOFFREY M. PARKINSON, AS TRUSTEE OF THE LAURA J. NILES TRUST, AND THE LAURA J. NILES FOUNDATION, INC.

*Respondents*.

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**Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Judge Seybolt presided over a New Jersey state court proceeding that adjudicated Laura Niles', her sister-in-law Serena Niles', and Laura's nephew Salvatore Bono's rights. The proceeding also adjudicated a devise of a parcel of real estate to Petitioner Serena Niles and imposed various surcharges and fees on Petitioner Serena Niles, who was neither a trustee or other fiduciary. While that proceeding was pending, Salvatore Bono, Serena Niles' son and substitute trustee, made claims in the federal action against Judge Seybolt personally, alleging specific facts demonstrating Judge Seybolt was not acting as an impartial arbiter when he initiated probate proceedings while Laura Niles was still alive. Judge Seybolt appeared in the Federal Action and instead of requesting a stay of those proceedings, adopted arguments made by other defendants who were also opponents of Salvatore Bono and Serena Niles in the New Jersey proceeding over which Judge Seybolt was presiding. This Court has established that a judicial officer must remain impartial and that the due process clause guarantees that parties have a right to be heard by an impartial tribunal. This Petition should be granted to address whether a litigant's due process right to an impartial tribunal is violated when a presiding state court judge takes a position that is so hostile to a co-litigant and to litigant petitioner Serena Niles that it precludes impartial adjudication of Petitioners' due process rights.

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**Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

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## PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The decision of the Supreme Court of New Jersey denying Serena Niles' Petition for Certification is unreported. (App. A, 1a.) The decision of the Superior Court of New Jersey Appellate Division is unpublished. (App. B, 29.) The Appellate Division decision is set forth in its entirety. (App. B, 2a-46a).

## JURISDICTION

The Supreme Court of New Jersey entered a final decision in this case on September 6, 2002 when it denied Niles's Petition for Certification. (App. A, 1a.) This Court extended

the time for filing a Petition for Writ of Certiorari to January 4, 2003. This Court has jurisdiction under 28 U.S.C. §1257(a) because the New Jersey appellate decisions affirming the judgment of the Superior Court of New Jersey, Chancery Division, Probate Part, Warren County court decision violated Niles' procedural and substantive due process rights under the Fourteenth Amendment of the United States Constitution. Petitioner Niles understands that a Petition for Writ of Certiorari on behalf of Salvatore Bono was filed on January 3, 2003.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Code of Judicial Conduct, Canon 3, section C(1)(a)

> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer or has personal knowledge of disputed evidentiary facts concerning the proceeding.

United States Code, 28 U.S.C. §455

> (A) any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality reasonably be questioned.
>
> (B) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

## INTRODUCTION

This case is a prime example of what happens when judicial officials, who are supposed to be impartial and impart equitable justice to all, abandon those principles and take sides in the controversy that they are charged with adjudicating impartially. Geoffrey Parkinson ("Parkinson"), a stockbroker, along with others, concocted a scheme to illegally seize full control of the considerable assets of elderly persons, including Henry Niles ("Henry") and his sister Laura Niles ("Laura"), by subverting and manipulating the judicial system. Laura and her younger brother Henry, inherited sizeable fortunes from their father's estate which included thousands of shares of General Electric stock (App. B, 5a.) Neither Laura nor Henry ever held a job during their lifetimes. (App. B, 5a.) On November 4, 1992 after a long relationship, Henry married Serena Zito. Henry died five years later on December 27, 1997 with no children. (App. B, 6a.)

In 1997, Laura J. Niles (now deceased) amended certain trust instruments which she had executed in 1992. (App. B, 10a.) She also executed certain additional testamentary documents. (App. B, 11a.) As part of the 1997 amendments, Laura Niles substituted her Nephew Salvatore Bono, Serena Niles' son, for Geoffrey Parkinson as testamentary trustee.

(App. B, 11a.) Later in 1997, Laura Niles created a new trust to replace the trust in which Parkinson had been named as trustee. (App. B, 11a.) The amendments effectuated certain additional changes, as well. The withdrawing trustee, Geoffrey Parkinson, filed a complaint for the approval of his accounting. As part of the complaint, he alleged that the 1997 amendments were the result of undue influence upon Laura Niles by her nephew Salvatore Bono, Serena Niles' son and her lawyer. (App. B, 13a, 14a.)

He made no specific allegations against Serena Niles. A year later, the Laura J. Niles Foundation, which had been established under the 1992 documents, filed a Complaint and then an Amended Complaint alleging undue influence by Serena Niles. (App. B, 15a.) A Consent Order was entered on May 12, 1999, consolidating the Foundation's Complaint with the Complaint previously filed by Parkinson. (App. B, 15a.) The court bifurcated the issue into two hearings. One hearing focused on Salvatore Bono's accounting and whether he should be removed as trustee and the second hearing focused on the undue influence. (App. B, 15a.)

In the spring of 1999, the trial court (Honorable Harry K. Seybolt, J.S.C.) (hereinafter "Judge Seybolt" or "Seybolt") presided over an accounting proceeding which concluded on July 15, 1999. (App. B, 15a.)

Thus, Parkinson, with the connivance and support of the New Jersey courts, started nothing less than a probate proceeding against Laura while she was still alive. After Laura tried to dismiss him as her advisor, Parkinson's verified pleading in New Jersey state court falsely claimed that Laura was incompetent. Judge Seybolt, who presided over the New Jersey proceeding brought by Parkinson, knowingly accepted Parkinson's fraudulent pleadings and participated in Parkinson's scheme to deprive Laura of her rights and punish Bono and his mother Serena Niles for his attempt to defend against Parkinson's scheme. Based on knowingly false

statements Parkinson had filed, Bono was temporarily removed as trustee on September 18, 1998; thereafter, Bono was barred by Judge Seybolt from defending himself, and at the conclusion of the accounting proceeding, Judge Seybolt permanently removed Salvatore Bono, who had served since 1997 as trustee, and surcharged him various sums. (App. B, 18a.) Judge Seybolt issued the opinion on August 3, 1999, after Bono filed suit in federal court against Parkinson and others, including Judge Seybolt, asking the Federal Court to intervene. The Federal Action was filed on June 29, 1999. (App. B,18a.) Seybolt denied a stay proceeding. (App. B, 16a.) Seybolt then publicly joined forces with other defendants in the Federal Action who were also Bono and Serena Niles' opponents in the New Jersey case over which Seybolt was presiding. Judge Seybolt went so far as to officially adopt arguments made by others in the Federal Action. (App. A, 92.)[1] Seybolt then dropped all pretense of impartiality and became outwardly hostile to Bono and his mother, Serena Niles.

In fall of 1999, Judge Seybolt tried the second phase of the case, the undue influence matter. By that time, Laura Niles had suffered a severe stroke and had become disabled. The stroke was in September 1997, which is *after* all the events that were the subject of the actions before Judge Seybolt. (App. B, 19a.) Parkinson obtained an *ex parte* appointment of a pre-selected guardian, Michael S. Selvaggi ("Selvaggi"), who was supposed to represent Laura's interests but actually advocated for Parkinson. Selvaggi then falsified the statements of eighteen witnesses to conceal pertinent information he had learned from witnesses sufficient to vitiate Parkinson's knowingly false claims and those raised against Serena

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[1] Petitioner asks this Court to take judicial notice of the pleadings and documents contained in the court's file in *Bono v. Barnowsky, et al.*, No. CV 99-3688 (TCP), in the United States District Court for the Eastern District of New York. *See* Fed. R. Evid. 201.

through the Laura J. Niles Foundation. Seybolt ignored the correcting affidavits and Selvaggi's false Guardian report and also barred the release of the handwritten notes Selvaggi had taken during the witness interviews. Selvaggi found that Parkinson and the Laura J. Niles Foundation had made a prima facie case of undue influence and that the matter ought to proceed to trial before Judge Seybolt. Selvaggi did not conclude that there had actually been undue influence by Serena Niles.

By ignoring overwhelming evidence to the contrary including the May 21, 1997 videotape memorializing Laura Niles' will and wishes, at the conclusion of the case on or about October 27, 1999, Judge Seybolt found that he had adduced sufficient evidence to demonstrate the existence of a confidential relationship between Laura and Serena Niles, her sister-in-law, and that there were suspicious circumstances in connection with the execution of the 1997 documents. (App. B, 29a.) As a result, Judge Seybolt shifted the burden of proof from Parkinson and the Foundation to the proponents of the 1997 amendments to establish that they were not the result of the undue influence. (App. B, 30a.)

At the conclusion of the trial, Judge Seybolt determined, in a letter opinion dated January 10, 2000, without even eliciting the opinion of the guardian ad litem, that the 1997 amendments were the product of undue influence. (App. B, 29a.) Consequently, he set the amendments aside and directed that the 1992 documents (and their modifications) control the disposition of the Laura J. Niles estate. (App. B, 30a; App. B, 46a-52a.) Judge Seybolt also set aside the intended devise of the real estate (a condominium apartment in Florida) a ruling which was based, ostensibly, on a finding of undue influence. The only evidence of undue influence in the trial proceedings, however, related to what plaintiffs described as efforts by Serena and her son Salvatore to induce

Serena's sister in law, Laura J. Niles, to substitute Bono for Geoffrey Parkinson as trustee of a multi-million dollar foundation and trust.

In March 2000, Judge Seybolt heard plaintiff's application for the award of various fees and costs against Serena Niles and Salvatore Bono. By final judgment dated March 24, 2000, Judge Seybolt awarded fees against Serena Niles and fees and costs jointly and severally against Serena Niles and Salvatore Bono. (App. B, 46a-52a.)

Judge Seybolt, as part of his judgment, imposed on Serena and Bono, jointly and severally, "surcharges" for the fees charged by Laura's counsel in effectuating the revisions. These fees totaled $314,282.00, encompassing not only the work required to substitute Bono for Parkinson but also all of the work relating to the numerous changes that were sustained. (App. B, 47a-52a.)

Serena had nothing to do with the retention of the lawyers who represented Laura and she had no discussions with them that were in any way pertinent to any of the revisions in Laura's estate plan. The wholesale imposition of this "surcharge" on Serena is at variance with traditional concepts developed by courts in the last two centuries.

The trial court also assessed damages in the amount of $50,000.00 against Serena and Bono for certain purchases effectuated by Bono. The trial court did this without any adequate showing in the record that the purchases were either not at Laura's direction or not for her benefit. (App. B, 52a.)

Finally, the trial court imposed a "surcharge" of $162,014.00 against Serena for counsel fees incurred in defense of her claim of entitlement to the condominium. (App. B, 51a.) The trial record does not reveal any undue influence specifically in connection with that proposed transfer.

The issue presented here is whether a co-litigant like Serena Niles may be deprived of property rights without a hearing before an impartial tribunal. This Court has previously held that the Due Process Clause requires that a party's rights be adjudicated by an impartial arbiter. Serena Niles had her property taken away and a judgment entered against her by a judge who, from the beginning, exhibited obvious bias and blatantly adopted and advocated adversarial legal positions in other pending litigation where the judge was a party. The issue is not whether, by suing a judge, a litigant may force the judge to recuse himself or herself. Instead, the Petition asks whether, in addition to clear bias evident from the inception of the case, Judge Seybolt's own choice to appear and join forces with Serena Niles' opponents in the Federal Action disqualified him in the state proceeding under principles of due process.

## STATEMENT OF THE CASE

### A. Geoffrey Parkinson Gains Control Over Millions in Assets by Establishing Foundations and Trusts for Siblings Henry and Laura Niles.

Geoffrey Parkinson was the financial advisor to Laura and her brother Henry and named himself as a director of charitable foundations he set up for Laura and Henry. (App. B, 5a.) Parkinson arranged for the creation of trust instruments giving him control over his clients' financial affairs, including Laura and Henry, while generating substantial fees for him as a trustee and for his financial advisory company. (App. B, 5a.) Parkinson was appointed as trustee of a revocable trust set up by Laura and two Charitable Remainder Unitrusts with Laura as grantor and settlor. (App. B, 7a.) Parkinson also had himself and a friend, Leland Selby, named as a directors of the Laura J. Niles Foundation, the residuary beneficiary under various trust instruments. (App. B, 5a.). The Trusts and the

Foundation together controlled over fifteen million dollars in assets, generating substantial fees for Parkinson and others involved in the scheme.

### B. Parkinson Secretly Tries to Get Appointed as Henry's Conservator in an Involuntary Proceeding to Maintain Control Over Henry's Assets and Keep Henry From Marrying Serena.

In or about 1990 or 1991, Parkinson approached Laura and made a number of ill comments against Serena and Henry to obtain her consent to having a limited judicial conservator appointed to help her brother Henry with his financial affairs. (App. B, 6a.) But Parkinson did not file that Petition and instead, without telling Laura, he filed an involuntary petition designed to keep Parkinson in control of Henry's assets and to prevent Henry from marrying Serena Niles, Bono's mother. (App. B, 6a.) The marriage was delayed for eighteen months, and a New York court appointed a conservator which stripped Henry of all control over his assets, leaving him with only a set monthly allowance that could not be spent without the conservator's permission. (App. B, 6a.) Parkinson then considers Henry to be competent to execute a revised "Services Compensation Agreement" that more than doubled his fees. The marriage took place on November 4, 1992. The conservator initiated annulment proceedings, which were withdrawn when Serena entered into a post-nuptial agreement. (App. B, 6a.) Henry died over five years later with no children. (App. B, 6a.)

### C. Laura Discharges Parkinson as Trustee and Replaces Him With her Nephew, Bono, But Parkinson Refuses to Relinquish Control.

At Laura's request, a law firm drafted documents to discharge Parkinson as trustee and replace him with Bono, as well as make other changes to her estate plan, and these

wishes were confirmed by Laura in documents executed in her own handwriting. (App. B, 11a.) Laura told Parkinson that she was discharging him, but he refused to resign as a director of the Laura J. Niles Foundation, Inc. (App. B, 10a, 11a.) Laura then established a New York corporation known as the Niles Foundation, Inc. which was named as the replacement residual beneficiary of her various trusts. (App. B, 12a.) The ceremonies where the documents were signed by Laura were videotaped, and neither Bono nor Serena Niles, her sister in law, were present. (App. B, 10a.) Dr. Schlesinger examined Laura and felt she knew where she was, why she was there and what she wanted to do. (App. B, 10a.)

### D. Parkinson Files a Knowingly False Verified Complaint in the New Jersey State Court.

On January 22, 1998, Parkinson filed a Verified Complaint in his individual capacity in the Superior Court of Warren County, New Jersey to have Bono removed as trustee and challenging Laura's competency even as he attached to the complaint trust amendments, advisory fee contracts, and other agreements entered into between Parkinson and Laura *after* the date he claims she suffered from alleged mental impairments. (App. B, 14a.)

### E. Parkinson, in an Illicit Ex Parte Proceeding, has His Chosen Guardian Appointed for Laura.

On January 22, 1998 Parkinson made an *ex-parte* motion for appointment of his chosen Guardian Ad Litem for Laura. (App. B, 14a.) Parkinson pre-selected Selvaggi as his chosen guardian by typing his name in the order presented to the court for entry, and even though Parkinson was adverse to Laura and no hearing was held, the New Jersey court signed and entered the *ex-parte* order prepared by Parkinson naming

Selvaggi as guardian ad litem to Laura. Selvaggi fabricated a report loaded with false and misleading statements supporting Parkinson's position. Eighteen witnesses submitted sworn affidavits stating that the report misquoted them and/or omitted material information and other witnesses made it clear that Selvaggi intentionally distorted and falsified statements they had made to him. (App. B, 14a.) Selvaggi did not make any finding on the undue influence issue as it related to Serena Niles.

### F. Judge Seybolt Orders That a Hearing be Held on the Issue of Undue Influence and Summarily Removes Bono as Trustee.

Based on Selvaggi's false report and despite clear video-taped evidence that Laura was competent when she discharged Parkinson and replaced him with Bono, Judge Seybolt found a *prima facie* case of undue influence and directed that a plenary hearing be held to resolve that issue. (App. B, 14a.) The Laura J. Niles Foundation, which Parkinson continued to control despite Laura's efforts to discharge him, then filed a Verified Complaint seeking relief as against Serena Niles. (App. B, 15c.)

The matters were consolidated with those of Parkinson. (App. B, 15a.) Judge Seybolt then summarily removed Bono as trustee under the three trusts. In addition, without any hearing, Judge Seybolt directed that Bono be permanently removed as a director from the Niles Foundation, Inc., a New York corporation which is subject to oversight by the New York Courts. (App. B, 15a.)

### G. Bono Seeks Protection and Justice for Laura, His Mother, and Himself by Filing an Action in Federal Court Against Seybolt and Others.

While Judge Seybolt was conducting the undue influence hearings in state court, Bono commenced an action, *Bono v. Barnosky, et al.*, No. CV 99-3688 (TCP), in the United States

District Court for the Eastern District of New York (the "Federal Action"), against Seybolt, Parkinson, and others seeking damages and injunctive relief for violating Laura Niles' Serena Niles', and Bono's civil rights and for corrupt acts alleged to have injured Bono in his person and property in violation of the RICO statute. The essence of the Federal Action was that Judge Seybolt became a voluntary participant in a scheme by Parkinson and others associated with him to control the affairs of wealthy elderly individuals like Laura and Henry and to manipulate the legal system to maintain this control over their fortunes. The scheme described in the Federal Action involved the prosecution of conservatorships or similar proceedings on the basis of false claims of incapacity, the submission of baseless doctor's reports, the appointment of biased guardians or conservators who act in concert with them and are appointed *ex-parte*. Judge Seybolt denied a stay of proceedings and proceeded without Bono's participation, leaving Serena to defend the actions.

### H. Judge Seybolt Officially Joins in Pleadings Filed by Parkinson and Other Defendants in the Federal Action While Continuing to Preside Over the Niles Matter and Ruling on Bono's Conduct.

In the Federal Action, Judge Seybolt officially aligned himself with the other defendants opposing Bono's requests for relief. Judge Seybolt "join[ed] in the motion to dismiss [Bono's] RICO allegations" made by other defendants and in the "brief filed by Michael Loprete, Esq." on behalf of other defendants. (App. D, 55a.) Counsel for Bono asked Judge Seybolt to recuse himself based on Seybolt's actions taking sides against Bono. (App. B, 16a, App. B.) Judge Seybolt denied the motion without a hearing. (App. B, 18a.)

### I. Judge Seybolt Openly Aligns With Parkinson in the State Court Proceeding.

Having successfully prohibited Bono, at Parkinson's behest, from participating in the state court case, Seybolt now turned openly hostile to Bono and Serena. In a prior opinion Judge Seybolt had stated that his "review of the videotapes of [Laura Niles'] execution of the trust modifications . . . showed a sense of humor and a surprising alertness for one who is 88 years old." (App. B, 25a.) A few months after responding to Bono's amended complaint in the Federal Action, Seybolt looked at the same videotape and completely altered his position, stating that "the videotape clearly shows Laura was in a weakened condition and she had very little input into these wholesale changes presented to her at that time." (App. B, 26a, App. B 28a.) Judge Seybolt also altered the burden of proof applicable to Parkinson's undue-influence charge, requiring Serena to rebut a presumption that undue influence occurred.

### J. The New Jersey Appellate Courts Ignore Bono and Serena's Due Process Arguments and Rubber Stamp Judge Seybolt's Inexplicable Rulings.

Serena filed a timely appeal to the Appellate Division of the Superior Court of New Jersey asking that Judge Seybolt's judgment be reversed. Bono also filed an appeal. Serena in her brief and in her petition for certification to the New Jersey Supreme Court, adopted all the due process arguments made by Bono. (App. B, 38a, App. F.) Bono and Serena's opponents in the Federal Action, deprived Serena of her due process rights to have claims against her adjudicated by an impartial judicial officer, and Seybolt's other rulings in violation of New Jersey law also deprived Serena of due process. Serena joined in Bono's due process argument. The Appellate Division, in affirming the judgment, did not even address

the due process argument and merely approved of Seybolt's refusal to recuse himself, holding that it was within his discretion to do so. (App. B, 43a.) The New Jersey Supreme Court, without comment, denied Serena's Petition for Certification on September 4, 2002. (App. A, 1.) Serena Niles now asks this Court to grant her Petition. Serena is aware that Bono filed a Petition for a Writ of Certiorari on January 3, 2003.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Petition presents an important issue of Constitutional Law—can a judge who blatantly and expressly joins adversaries of a litigant against one of the litigants appearing before the judge maintain constitutionally-required impartiality. This Court has previously held that a litigant has a right under the Due Process Clause to have disputes adjudicated by an impartial tribunal.

### I. PROCEDURAL DUE PROCESS DEMANDS THAT LITIGANTS' DISPUTES BE ADJUDICATED BY AN IMPARTIAL TRIBUNAL

Judge Seybolt's actions implicated Serena Niles' Fourteenth Amendment due process rights when he refused to recuse himself from the trials of Salvatore Bono and Serena Niles.[2] In *Tumey v. Ohio* the Court stated that "it violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The due process clause protects not only

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[2] Federal judges are obligated to disqualify themselves whenever their impartiality "might be reasonably questioned." 28 U.S.C. § 455(a). *See also* New Jersey Code of Judicial Conduct, Canon 3(C) contains the identical language.

against express judicial improprieties but also against conduct that threatens the "appearance of justice." *Aetna Life Insurance v. Lavoie et al.*, 475 U.S. 813, 825 (1986). In finding that a state judge "acted as a judge in his own case" in a civil matter, the Court echoed *Tumey*, while recognizing that the appellant insurer's "case presented more than mere allegations of bias and prejudice" where an Alabama Supreme Court Judge's opinion had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. *Aetna Life Insurance*, 475 U.S. at 821 and 824 (1986) (where an Alabama Supreme Court Judge filed two actions *in* an Alabama Court against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages, while a petition for rehearing was pending on the same issue before the Alabama Supreme Court) (*citing Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

"[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). In *Offutt v. United States*, 349 U.S. 11 (1954), where this Court determined that a judge who became personally embroiled with counsel during trial should ask another judge to conduct a hearing charging that same counsel with contempt, this Court stressed that "justice must satisfy the appearance of justice." *Id.*, 349 U.S. at 14. This principle applies to civil cases as well as criminal cases. *See Marshall v. Jericho, Inc.* 446 U.S. 238, 242 (1980). The requirement of impartiality "helps to guarantee life, liberty or property will not be taken on the basis of erroneous or distorted conception of the facts or the law." *Id.*

## II. DUE PROCESS PROHIBITS A JUDGE FROM ADOPTING AN OPENLY ADVERSARIAL STANCE AGAINST A LITIGANT, ESPECIALLY IF A CO-LITIGANT SUES THE JUDGE IN ANOTHER FORUM

That Judge Seybolt was automatically required to recuse himself when Bono sued him has been rejected by the federal courts, and Serena Niles does not challenge that principle. *See United States v. Pryor*, 960 F.2d 1, 3 (1st Cir. 1992) ("It cannot be that an automatic recusal can be obtained by the simple act of suing the judge"); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986) ("A judge is not disqualified by a litigant's suit or threatened suit against him") *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977) (same).

In the instant case, by brazenly aligning himself with the parties opposing Niles in actually adding his name to and participating in the Federal Action instituted by Serena Niles' son Bono, a fellow litigant against him, Judge Seybolt obtained a "direct, personal, substantial pecuniary interest" in reaching a conclusion against both Bono and Niles, while enabling himself to act as judge in his own case. Should Parkinson, *et al*, triumph over Bono and Niles in the New Jersey action, the federal defendants, including Seybolt, could enhance their legal status in the Federal Action by arguing that the federal suit by Bono was merely a baseless distraction designed by an unsuccessful party in an attempt to suspend the New Jersey action.

Federal courts agree that a judge must recuse himself even when his or her name is tangentially connected with a position advanced by an adversary in a current action he is concurrently adjudicating. *See Republic of Panama v. American Tobacco Co.*, 217 F.3d. 343 (5th Cir. 2000) (trial judge ordered to recuse himself merely because his name appeared on a brief filed by the state trial lawyers' association in an unrelated case); *see Bradshaw v. McCotter*, 785 F.2d

1327 (5th Cir. 1986), *rev'd on other grounds*, 796 F.2d 100 (5th Cir. 1986) (recusal required where state criminal appeals judge's name was listed on a brief as a state prosecuting attorney in the defendant's appeal, though the judge did not actually participate in the prosecution of the case). The scope of the inquiry required under § 455(a) is "not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of the circumstances." *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The circumstances in the present case show that Judge Seybolt's behavior was not impartial from any point of view. Judge Seybolt purposefully and publicly aligned himself with the parties adversarial to the Petitioner and actually participated in their common defense to Petitioner Bono's federal allegations. Where a judge has actively aligned with those opposing a litigant appearing before the judge, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Though actual knowledge of a pending case may embroil a judge in Fourteenth Amendment concerns vis-à-vis a litigant, scienter is not an element of a violation of § 455(a). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 (1988) (where a judge sitting on a University's Board of Directors tried a case which ultimately benefited the University). The judge's lack of knowledge of a disqualifying circumstance . . . does not eliminate the risk that "his partiality might reasonably be questioned" by other persons. *See id.* Moreover, the Congressional intent of § 455(a), which was to promote public confidence in the integrity of the judicial process, does not depend upon whether or not the judge actually knew of facts creating the appearance of impropriety, so long as the public might reasonably believe

that he or she knew. *Id.* Here, Judge Seybolt far surpassed the appearance of impropriety—he actually assumed a position adversarial to the Petitioner, and did so in the public eye.

Upon the mere public appearance of impropriety, a fairly low standard, Judge Seybolt should have recused himself immediately upon having his partiality questioned in light of his active participation with Parkinson and other parties opposing Bono in the federal suit against Seybolt. Petitioner Niles does not argue that Judge Seybolt was required to recuse himself merely because Petitioner Bono sued him in federal court, but because Petitioner Niles' due process protections were compromised when Judge Seybolt aligned himself with the parties opposing Niles in the current suit.

### A. The Niles and Bono Actions are so Enmeshed by Fact and Law that their Due Process Rights are Inextricably Intertwined for the Purposes of Judge Seybolt's Recusal

The Niles and Bono actions are based upon the same facts and occurred simultaneously.[3] The record makes it plain that Judge Seybolt did not merely rule against Bono and Serena on contested issues—Seybolt, from the beginning, aligned himself with Parkinson to protect Parkinson's interests at the expense of Bono and Serena.

In her Petition to the New Jersey Supreme Court Serena Niles adopted the due process arguments of Bono, writing, "Serena also joins in those arguments presented by Bono in his petition for Certification to the extent that they affect her." (App. F.) The outline of the Due Process argument is set forth in the opinion of the Appellate Division. (App. B, 37a-38a.)

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[3] 28 U.S.C. § 455(b)(1) further directs federal judges to disqualify themselves "where [they] have a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1).

The New Jersey appellate courts failed to intervene and simply concluded that Seybolt himself had apparently unlimited discretion to decide whether he should recuse himself or continue to preside and make certain that Parkinson's scheme was successful. The Appellate Division wrote, "we are satisfied Judge Seybolt properly exercised his sound discretion in denying Salvatore's application for recusal; recusal rests in the sound discretion of the trial judge whose impartiality is challenged." *Panitch v. Panitch*, 339 *N.J. Super.* 63, 66 (App. Div. 2001); *Jadlowski v. Owens-Corning*, 283 *N.J. Super.* 199, 221 (App. Div. 1995), *certif. denied.*, 143 N.J. 326 (1996). The New Jersey proceeding presided over by Seybolt made a mockery of the Due Process Clause's guarantee of a hearing before an impartial arbiter.

**B. Judge Seybolt's Actions in Choosing to Actively Participate in Tandem with Parties Opposing Bono in a Federal Suit Against the Judge by the Bono Necessitated his Recusal in the Niles Action because Judge Seybolt's Partiality in Bono's Action Compromised his Ability to Remain Impartial in Petitioner Niles' Action**

A reasonably objective observer, looking at Judge Seybolt's partisanship on behalf of Parkinson and his efforts to cover up that favoritism, would conclude that by taking an active role as an adversary to Bono, one of the litigants before him, Judge Seybolt abandoned his impartiality. After receiving Bono's First Amended Complaint in the Federal Action that, *inter alia*, challenged Seybolt's improper, *ex parte* appointment of a guardian ad litem and other actions taken in favor of Parkinson, Seybolt deprecated Bono's Federal Action pleading on the record during the state proceeding. (App. B.) In an attempt to defend the appointment of Parkinson's chosen guardian, Seybolt began claiming that Parkinson filed his false Verified Complaint on January 20, 1998, instead of January 22, 1998, as he had

previously stated and despite a myriad of other documents in the record, including his own orders, belying that assertion. The filing date is critical because it determines whether, as Bono alleged, the guardian was improperly appointed *ex parte*. Seybolt's stated impressions of Laura's competence when she replaced Parkinson with Bono as her financial advisor changed markedly after Seybolt received the Amended Complaint. Instead of being a woman with a surprising sense of humor and alertness, Seybolt now called her a woman who was in a weakened condition with very little input in her affairs. After receiving the Amended Complaint in the Federal Action, Judge Seybolt entered a default against Bono, struck his pleadings without the required notice being given, prohibited Bono from any further participation in the proceedings, removed him permanently as trustee, and entered a million dollar judgment against him even though none of the pleadings gave notice that damages were being requested. Seybolt also forced Serena to trial of the undue influence action without the participation of Bono or his counsel.

The Petition should be granted to address whether, under these circumstances, Serena Niles was deprived of her due process rights because Seybolt, who had become her adversary, continued to preside over the state court matter.

## CONCLUSION

Serena Niles was deprived of the most fundamental protections of due process and her substantive rights at every phase of the proceeding. A double standard was applied by the court to deliberately injure Petitioner, members of her family, and all those whose interests were adverse to Parkinson's scheme. The issue presented in this Petition is an important question of law involving this Court's Due Process jurisprudence, and the Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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January 6, 2003

**APPENDIX A**

SUPREME COURT OF NEW JERSEY
C-37 September Term 2002

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IN THE MATTER OF THE TRUST CREATED MARCH 31, 1992 BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE;

ON PETITION FOR CERTIFICATION

TRUST CREATED MARCH 31, 1992, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE; and

TRUST CREATED AUGUST 23, 1994, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE.

(SERENA NILES—Petitioner)

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To the Appellate Division, Superior Court:

A petition for certification of the judgment isn A-4644-99 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice at Trenton, this 5th day of September, 2002.

| | |
|---|---|
| CLERK OF THE<br>SUPREME COURT<br>OF NEW JERSEY | CLERK OF THE<br>SUPREME COURT |

**APPENDIX B**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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A-4644-99T1
A-4649-99T1

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IN THE MATTER OF THE TRUST CREATED MARCH 31, 1992 BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE; TRUST CREATED MARCH 31, 1992, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE; and

TRUST CREATED AUGUST 23, 1994, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE.

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On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Warren County, Docket No. P.98-0435.

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Argued: December 19, 2001—Decided: March 14, 2002

Before Judges Baime, Fall and Axelrad.

PER CURIAM

In these consolidated appeals, we consider the challenges of appellants, Serena Niles (Serena) and her son, Salvatore A. Bono (Salvatore), to the findings and conclusions of the trial court after a bench trial as memorialized in an amended final judgment entered on March 24, 2000.

The trial court found that Salvatore committed numerous acts of malfeasance, negligence and self-dealing as trustee under trusts created by Laura J. Niles, (Laura). The court permanently removed Salvatore as trustee and fiduciary to

Laura; removed Salvatore as a director of the Niles Foundation, Inc. (Niles Foundation);[1] and imposed surcharges against Salvatore.

The trial court also found that Salvatore and Serena exerted undue influence upon Laura, improperly causing Laura to execute documents that, inter alia, transferred control over her assets and affairs to Salvatore; and that Salvatore and Serena, working in concert, abused the trust and confidence Laura placed in them by, "among other things, attempting further changes to her will, using Laura's credit cards, checks, and cash for personal expenditures, obtaining improper and unauthorized compensation for Salvatore Bono, and using the funds in the trusts for wholly improper purchases[.]"

As a result of these findings, the March 24, 2000 amended judgment, in pertinent part:

> (1) Entered judgment against Salvatore and Serena in favor of plaintiffs Geoffrey M. Parkinson (Parkinson) and the Foundation on all allegations of undue influence contained in their complaints;
>
> (2) Declared as null and void:
>
> (a) the "Modification of Restatement of Trust Agreement" dated May 21, 1997,
>
> (b) the "Dismissal and Replacement of Trustee," dated May 21, 1997, for the Laura J. Niles Charitable Remainder Unitrust (CRUT I) and the Laura J. Niles Charitable Remainder Unitrust II (CRUT II),
>
> (c) the "Second Modification and Restatement of Trust Agreement" dated August 15, 1997; and

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[1] The Laura J. Niles Foundation, Inc., a non-profit corporation, was formed on or about March 31, 1992, is the respondent-appellant herein and shall be referred to as "Foundation." The Niles Foundation, Inc. was formed on or about August 15, 1997, is a New York non-profit corporation, and is referred to herein as "Niles Foundation."

(d) all other wills, codicils, trust agreements, trust amendments, documents affecting powers of attorney, and other testamentary or trust documents signed by Laura on or after January 1, 1997;

(3) Declared that the personal assets of Laura and the assets held in the trusts established by Laura shall be governed by the provisions of the trust documents, wills, codicils, and other testamentary documents in effect as of January 1, 1997; Reinstated Parkison as the executor, trustee, and attorney-in-fact for Laura;

(4) Reinstates Parkinson as the executor,

(5) Assessed a surcharge against Serena in the amount of $162,014;

(7) Ordered that Salvatore and Serena be jointly and severally liable to the Laura J. Niles revocable Trust created March 31, 1992, for counsel fees in the amount of $314,282; and

(8) Ordered that Salvatore and Serena be jointly and severally liable to the Foundation in the amount of $50,000 for compensatory damages.

The Foundation and Geoffrey M. Parkinson (Parkinson) cross-appeal, contending the surcharges and damages imposed in the March 24, 2000 amended judgment are inadequate.

Two of three trusts at issue were created by documents executed by Laura on March 31, 1992, which revised here prior will and established: (1) a revocable trust into which Laura placed most of her assets, the residuary beneficiary of which was the Foundation; and (2) a charitable remainder unitrust (CRUT I) into which Laura placed a small portion of her assets for income-production and tax-savings purposes. The third trust, a second charitable remainder unitrust (CRUT II), was created by Laura on August 23, 1994. Parkinson was

the appointed trustee under these three trusts from their inception, until removed by the documents executed by Laura on May 21, 1997.

Laura was born on July 1, 1909, was never married and had no children. Henry E. Niles (Henry) was Laura's younger brother; he died on December 27, 1997, a resident of New York. On November 13, 1992, Joseph J. Kunzeman, Esq. (Kunzeman), was appointed conservator of the property of Henry by order of the New York Supreme Court. Parkinson and Leland C. Selby, Esq. (Selby) are the proposed executors of Henry's estate under his will, probated in the Suffolk County, New York, Surrogate's Court.

Laura and Henry inherited a sizable fortune from their father's estate, which included thousands of shares of General Electric stock. Neither Laura nor Henry ever held a job and, until 1986, they lived together in their jointly-owned family home in Brightwaters, Long Island, New York.

In 1986, Laura purchased a home in Blairstown, New Jersey, situated on a twenty-five acre parcel on which she pursued her hobby of breeding show-quality poodles, and she maintained horses.

Parkinson was a long-term neighbor and friend of Henry in New York. Parkinson was retained as Henry's financial manager and gave Laura Financial advice for many years, becoming her portfolio manager in the 1990's when he worked for Shearson Lehman Brothers. Parkinson subsequently formed his own financial consulting firm, Greenwich Advisory Associates.

When Laura left the Brightwaters home in 1986, Henry was in declining physical and mental health. A friend of Laura's asked Serena if she would occasionally check on the well-being of Henry. Serena was approximately thirty years younger than Henry. Between 1986 and 1989, Serena and

Henry formed a relationship and would regularly dine together at a restaurant of which Serena was a part owner.

By 1990, Henry was incapable of handling his personal and financial affairs. In that year, Henry sustained a million-dollar loss at the hands of an unscrupulous stockbroker. As a result, Parkinson and Selby, Henry's New York attorney, suggested that Henry institute voluntary conservatorship proceedings to ensure that his property and money would be appropriately managed. Laura agreed that the appointment of a conservator would be in Henry's best interest.

After the conservatorship proceedings were instituted in New York, Parkinson and Selby learned that Serena and Henry were contemplating marriage. On April 19, 1991, Selby obtained an order from the New York court prohibiting the marriage between Henry and Serena; thereafter, Henry refused to participate voluntarily in the conservatorship proceedings. Serena obtained new counsel for Henry to defend against conservatorship proceedings, but was unsuccessful.

Kunzeman was appointed as Henry's conservator, and Parkinson remained as Henry's financial advisor. Notwithstanding entry of the restraining order, Henry and Serena married on November 4, 1992.

Kunzeman initiated annulment proceedings in New York, which were withdrawn when Serena entered into a post-nuptial agreement that would provide her $250,000 per year for every year she remained married to Henry and a $1 million bonus if she remained married to Henry for a period of five years. As previously noted, Henry died on December 27, 1997. Henry had no children.

Laura's 1988 will was drawn by James Lamb, a New Jersey attorney who represented Laura when she purchased the Blairstown home. That will made a number of specific bequests to charities and made Henry and Laura's god-daughter, Carol Boehn, income beneficiary for life of a trust

containing the residue of Laura's estate which, upon the death of the surviving life tenant, was to be divided equally among four individuals: Kara and Eric Leib, Elizabeth Langham and Michelle Lennen.

Following Lamb's advice, Laura executed a new will and trust documents that revised her estate plan. The new will, executed on March 31, 1992, directed her entire estate, except her dogs, into two trusts, both also executed on March 31, 1992. One trust was the CRUT I, into which Laura placed over $9.5 million of her assets, largely consisting of stocks; six-percent of the value of those assets was to be paid to Laura annually, and on her death, the principal and income were to got the Foundation. The second revocable trust created on March 31, 1992 paid Laura all of the net income of the trust estate and, at Laura's death, provided specific bequests for the named beneficiaries, with the Foundation named the residuary beneficiary. Parkinson was named trustee of both the CRUT I and the second revocable trust document, and Lamb was named as successor trustee of both trusts. Parkinson and Lamb, successively, were given medical power of attorney by Laura at the same time.

The trust agreements were subsequently modified. The first modification was executed on May 26, 1994, to provide for bequests to Gregory Drejka and Romana Baranska, Laura's housekeepers.

On August 23, 1994, Laura executed a document creating a second charitable unitrust (CRUT II), which was designed to yield her a higher income from the assets it contained. Parkinson and Lamb were appointed successor trustees of the CRUT II. The terms of the CRUT II were identical to the CRUT I, except that Laura would annually receive nine-percent of the net fair market value of the assets in the CRUT II. On that same date, Proctor as a named beneficiary and amending a provision for beneficiaries, Patricia Lennen and her son Kim.

In 1995, the trusts were modified in September and December, the first increasing the provision for Drejka and Baranska, and the second re-affirming Proctor's removal as beneficiary.

By January 1994, Laura had been diagnosed with a number medical problems. Her physician, Dr. Craig Buggelin, who had demented 84-year-old with multiple medical problems, "that included organic brain syndrome, cerebrovascular disease, hypertension, hyperchloresterolmia, cholelithiasis, chornic anemia, seizure disorder, peptic ulcer disease, and hemorrhoids. Buggelin asserted that "each of these problems is medically stable" as long as Laura took a series of medications, and followed a low sodium, low saturated fat meal plan at home. However, Dr. Buggelin observed that because of her organic brain syndrome, she could not be relied upon to take her medications properly or to follow through with the dietary restrictions. Consequently, he recommended that Laura be provided twenty-four hour nursing care either at home or in a chronic care nursing/ retirement facility.

By October 1994, Parkison was given the responsibility for handling Laura's checkbook and for paying her monthly expenses. Parkinson never signed the checks. Rather, the monthly bills were collected by Drejka and given to Parkinson, who would prepare the checks, return them to Drejka, who would then have Laura sign them.

Laura changed doctors in April 1995 and began seeing Dr. Leslie Schlessinger, who found "alert, oriented and seemed to be mentally competent" when he first saw her.

When Serena first started seeing Henry in 1986, Laura did not like her. Indeed, Laura filed a waiver and consent to the appointment of co-conservators for Henry at a time when Parkinson and Selby were seeking both a conservatorship and the injunctive relief against the contemplated marriage of Henry and Serena. Michael Selvaggi, the court-appointed

guardian ad litem for Laura, reported that Laura characterized Serena as "a con-artist" who was only marrying Henry for his money.

Nevertheless, Laura began spending more time with Serena and Henry after their marriage in 1992, celebrating holidays with them at Brightwaters, and spending time at Blairstown when Henry and Serena would visit. Serena began pressuring Laura purchase a condominium in Naples, Florida for use by Serena, Henry, Laura and other family members. Laura refused Serena's initial request. However, by November 1995, Serena had convinced Laura that the purchase would be in Henry's best interest, despite the advice of Lamb and Parkinson that the decision was not wise. Parkinson authorized the condominium purchase for approximately $695,000, but, for tax purposes, arranged for the purchase to be made by the revocable trust and required Henry and Serena to pay a monthly rent of $7,500.00.

On September 12, 1995, Laura and Kunzeman, as conservator of Henry, executed a deed conveying the Brightwaters property into the joint names of Henry and Serena.

Thereafter, Laura began to spend more and the more time with Serena, and then Salvatore, in Florida, New Jersey and New York. According to Serena and Salvatore, Laura became unsatisfied with Parkinson and his management of her affairs. Laura's nurses reported that in 1997 Laura began speaking ill of Parkinson, claiming she could no longer trust him and that Parkison was charging too much for his services.

According to Salvatore, Laura asked him to recommend an attorney. Salvatore directed Laura to his friend, Gerald Schrager, an attorney with New York Law firm of Fischbein Badillo, and to Gregory O'Connell, of the New York law firm DeFeis, O'Connell & Rose, with whom Salvatore had an attorney-client relationship.

In mid-April 1997, Laura contacted Schrager and asked him to review her estate documents. Shortly thereafter Laura met with Salvatore, Schrager and his law Partner Lawrence Gilberti, and Drejka, as which time they discussed Laura's estate plan. Laura told Schrager and Gilberti that she wanted to amend her estate plan and appoint Salvatore as her new trustee. Salvatore was present and participated in the meeting.

There was a second meeting between Laura, Gilberti and Schrager, where they discussed the individuals to whom Laura wanted to leave bequests; specifically money to Salvatore's children and the Florida condominium to Serena. Gilberti asked Laura to write down how much money each of Salvatore's children would receive and the types of charities her foundation would support.

On or about May 13, 1997, Salvatore brought written instructions to Gilberti, marked with Laura's initials next to each bequest and, at the end, in a third party's handwriting, was the notation $1 million to Salvatore Bono to take as I wish." The signature next to the language purported to be that of Laura. Gilberti told Salvatore that was a bad idea, and Gilberti prepared a draft of Laura's will that did not contain the million-dollar bequest to million-dollar bequest to Salvatore; however, the will contained bequests to each of Salvatore's four children.

The new will and trust documents were signed at Laura's home in Blairstown on May 21, 1997, in the presence of Gilberti, Schrager, Schrager's secretary Bridget Hitzler, another attorney, and a videographer who videotaped the proceedings. At that time, Dr. Schlessinger was asked to examine Laura. Although Laura had difficulty doing some of the tasks Dr. Schlessinger asked—Laura thought the year was 2000, not 1997, and was confused as to the day and date—Dr. Schlessinger felt that she knew where she was, why she was there, and what she wanted to do.

The May 21, 1997 will made Salvatore the executor of Laura's estate and placed the residue of her estate into her trusts. The May 21, 1997 modification to the March 31, 1992 trust agreement provided for the Florida condominium to be conveyed and distributed to Serena upon Laura's death. The trusts were modified to remove Parkinson and Lamb as trustees and replace them with Salvatore. A superceding medical power of attorney was given by Laura to Salvatore.

On July 16, 1997, Laura was hospitalized, suffering from dehydration due to vomiting and diarrhea. She was discharged one week later to the Brighwaters home to live with Henry and Serena. A few weeks later, Laura returned to Blairstown. However, while still at the Brightwaters home, Laura executed a "services compensation agreement" with Salvatore on July 25, 1997, under which Laura agreed to pay Salvatore on $100,000 per year for his services as trustee of the revocable trust, as well as providing Salvatore compensation for

> management and administrative services with respect to Ms. Nile's personal assets which are not included within the corpus of the Revocable Trust, including record keeping and oversight with regard to her personal checking accounts, regular reporting to her as to an inventory and valuation of her assets, oversight and coordination of her personal tax, legal and accounting affairs, and the rendering to Ms. Niles periodic reports on cash flows and projections of her cash needs.

The compensation was to be paid bi-annually on May 21 and November 30 of each calendar year, the initial fee payment of which was to be paid on the execution of the execution of that July 25, 1997 agreement.

Parkinson, Lamb and Selby refused to resign as directors of the Foundation. Laura then further modified her trust agreements on August 15, 1997, replacing the Foundation

with a new one, called the Niles Foundation, Inc. Those documents made clear that Salvatore's compensation was to be pursuant to their separate compensation agreement.

Three weeks later, on September 9, 1997, at an age of eighty-seven, Laura suffered what Dr. Schlesinger variously described as a "rather massive," or "moderately severe:" stroke. The stroke left Laura "quite debilitated. She was paralyzed on her left side; unable to swallow; required a feeding tube for nutritional purposes; her speech was impaired; and she suffered from congestive heart failure.

On September 17, 1997, Laura was transferred to the rehabilitation institute at Morris town Memorial Hospital where she remained for four weeks before being discharged to the Brighwaters home on October 23, 1997.

Prior to her stroke, Laura told Salvatore she wanted to replace her station wagon vehicle with another station wagon. Laura looked at several vehicles and then, a few days before her stroke, went with Drejka to a Mercedes dealership and placed a $1,000 deposit on a Mercedes station wagon vehicle that cost $56,000. However, on October 16, 1997, Salvatore wrote a check on Laura's account to Sovereign Motor Cars for $74,022 in connection with the purchase of S420 Mercedes Sedan for a total cost of $75,115.50. Prior to Laura's stroke on September 9, 1997, Salvatore had spoken with Schrager about the purchase of a Mercedes Benz vehicle; Schrager advised against it, but Salvatore claimed it was something Laura wanted.

On September 18, 1997, Salvatore advised Gilberi that Laura wanted Salvatore to have a $50,000 raise in his compensation as trustee. On September 19, 1997, Gilberti drafted an amended compensation agreement and wrote to Salvatore that he first wanted to confirm that this was Laura's intent. Although Salvatore became irate at this position, Gilberti and Schrager maintained they attend to execution of

the modification to the agreement until they confirmed its accuracy with Laura; that never occurred. However Salvatore independently obtained Laura's signature on the amended compensation agreement. As of July 1998, Salvatore had paid himself $200,000 in compensation as Laura's trustee, which was $ 50,000 in excess of even what the amended compensation called for.

Two days before Henry died, Salvatore's secretary drew a check on Laura's account in the amount of $20,460 for the purchase of Cartier watch, purportedly a Christmas gift from Laura to Henry. Laura was not present when the watch was presented to Henry and Henry was so sick he was unable to open the package or respond in any way.

After Henry's death, Salvatore requested Gilberti to draw a new will for Laura that would remove the charities and leave the entirety of Laura's residuary estate to Serena. On January 16, 1998, Dr. Schlessinger saw Laura at Gilberti's request. Dr. Schlessinger administered a standard mental examination, which Laura failed. According to Dr. Schlessinger's testimony, Laura made seven significant errors and experienced great difficulty expressing herself. Dr. Schlessinger concluded Laura was not mentally competent and so informed Gilberti and Salvatore.

After Henry's death, the month living-expense payments from Henry's conservator ceased. Thereafter, Salvatore issued a series of checks from Laura's account to pay household expenses at the Brightwaters home. Additionally, between June 1997 and August 1998, over $47,000 was charged to Laura's credit cards, the majority of which Salvatore was unable to account for or explain. Salvatore acknowleged those purchases could have been made by Serena, since she had access to Laura's credit cards.

On January 20, 1998, Parkinson filed a three-count verified complaint and accounting in the Probate Part, seeking: (1)

allowance of the settlement of this account; (2) allowance of investment advisory fees; and (3) appointment of a guardian ad litem for Laura. On January 22, 1998, the Warren County Surrogate issued and order to show cause with respect to the accounting and appointed Michael S. Selvaggi, Esq. as guardian ad litem for Laura, directing that Selvaggi issue a report concerning the allegations of undue influence of Laura by Salvatore and Serena, as set forth in the third count of Parkinson's complaint.

By answer dated March 6, 1998, Salvatore objected Parkinson's accounting and filed a counterclaim seeking dismissal of the complaint; denial of the request for investment advisory fees; the surcharge of Parkinson's for improper disbursements from the trusts; and for excessive fees and attorneys' fees and costs.

On April 6, 1998, Judge Seybolt ruled Salvatore had no standing to challenge Parkinson's accounting.

On May 15, 1998, Selvaggi filed and eighty-eight page report with the court, containing summaries of his interviews with twenty-nine individuals and fifty exhibits. Selvaggi recommended that the Probate Part conduct a plenary hearing on the undue influence issue; that the court accept Parkinson's accounting as submitted; and that Selvaggi be continued as Laura's guardian ad litem.

On June 23, 1998, the court entered an order that allowed the accounting as submitted; awarded the investment advisory fees as requested, as well as attorneys' fees and guardian ad litem fees; ordered a hearing on the issue of undue influence; required a formal accounting by Salvatore with respect to his services as trustee from May 21, 1997, to the present; and retained Selvagi as Laura's guardian ad litem.

On July 31, 1998, Salvatore filed a complaint in settlement of his account and his accounting as trustee, which he amended on August 24, 1998. On August 27, 1998, Park-

inson filed exceptions to Salvatore's accounting and sought removal of Salvatore as trustee and the surcharge of Salvatore for improper expenditures.

On September 18, 1998, the court heard argument on motions brought by Parkinson and the Foundation to have Laura declared incompetent, to have a guardian appointed for her, and to have Salvatore removed as trustee. On September 24, 1998, the court entered an order that declared Laura an incapacitated person; appointed Selvaggi her guardian ad litem and temporary trustee; removed Salvatore as trustee pending final determination of the issues of the merits; and ordered Salvatore make a supplemental accounting of all trust activities from May 31, 1998 to the present.

On December 18, 1998, Salvatore filed the supplemental accounting, Parkinson and the Foundation filed a series of exceptions to Salvatore's accounting.

On January 19, 1999, the Foundation filed a verified complaint in the Probate Part, seeking a determination that Serena and Salvatore exerted undue influence upon Laura to revise the trust agreements in their favor, to obtain unfettered use of Laura's credit cards, and to devise Laura's Florida property to Serena. The complaint requested and order compelling appropriate reimbursement.

A consent order was entered on March 12, 1999, consolidating the Foundations's complaint with the complaint previously filed by Parkinson.

The court bifurcated the issues into two hearings. One hearing focused on Salvatore's accounting and whether he should be permanently removed as trustee, and the second hearing focused on the issue of undue influence. The first hearing commenced on April 21, 1999 and continued on May 3, May 4, 1999, July 12, 13, 14, 199 and concluded on July 15, 1999.

On June 29, 1999, while the accounting and removal hearings were underway, Salvatore filed a pro se complaint in the Eastern District Federal Court of New York against numerous individuals involved in the New Jersey Probate Part trial, including Judge Seybolt, Parkinson, Selvaggi, and all participating legal counsel. Salvatore's complaint charged the named defendants with fraud and racketeering, among other claims. On defendants' motion, the federal court dismissed Salvatore's action by order entered on September 20, 2000.

On July 12, 1999, counsel for Salvatore advised the court that Salvatore had decided to seek a stay of the proceedings before the court from the federal court and would not be present. Additionally, counsel for Salvatore's filing of the federal action. Salvatore's counsel also moved to be relieved. Judge Seybolt denied both applications starting, in pertinent part:

> The issue are still open. And in spite of efforts by [Salvatore] to try to get me into a position whether I overstep myself or decide an issue before the issue is ready to be decided or overreact to react to what he has attempted to do both is his previous letter and in his suit in the Federal District Court, I recognize he has a right to seek relief in the Federal District Court.
>
> I don't feel he has the right to derail this proceeding. And if I were to grant your motion at this point I would derail this proceeding and postpone it. . . . I think this matter gone on long enough and I feel that we ought to get these issues resolved. We have a trial date in September, which I hope to follow on the undue influence issue. I hope we can get through this issue. We have set the entire week aside and a really tight schedule to get the issue of the accounting decided. I intend to move forward with it.

So as far as allowing you to withdraw at this point, I don't think you comply with Rule 1:11-2. I recognize that is puts you in a very difficult position. . . . However, I'm going to deny your application to withdraw at this point because we are ready to go today.

. . . .

I don't feel, and I don't feel that I am today biased against [Salvatore]. I have tried to up to now and I will continue to try to give him every opportunity to present his side of the case, but I am going to decided it and if somebody doesn't like it that's why we have and appeal procedure with respect to that. But I'm not going to put this off, we have set the entire week aside for this hearing to drop a box of papers off on me last Tuesday, with the idea to postpone this case, won't work, I will not yield to that particular tactic.

I will give [Salvatore] his fair day in court, if he chooses to waive his appearance, if he chooses to waive his appearance, if he chooses to waive having counsel. If he wanted to have another counsel standing here representing him today he should have decided that before last week and made that move. He chose not to be here today. He chose to be someplace else. I am not interested in where, but we are proceeding. . . .

. . . .

But, I'm going to decide it based on what's submitted to me and despite the fact that he is trying his best to get this case removed from this courtroom, he is not successful at it and I don't expect somebody to walk in here five minutes to get a full grasp of the case and decided whether or not I am biased or unbiased. . . .

. . . .

> I think . . . after my communication to you . . . in effect his not appearing today knowing that he is in the process of . . . examination . . . he is in contempt of court. . . . I will have to refer the matter to the prosecutor and have the matter presented to another judge who will then decide whether his failure to appear today is in contempt of court. I am electing not to do that, but I do state on the record that I fell that that is showing some contempt of court. I am going to overlook that and in the interest of fairness proceed with the idea that he may have erred in judgment in deciding not to come here today[.] . . . I want to proceed in as fair a matter as I can as to [Salvatore], but also as to the other parties in this case.

An order memorializing the denial of Salvatore's recusal motion was execute on July 29, 1999. Salvatore failed to appear at any of the subsequent hearings; however, his counsel participated and called witnesses.

On August 3, 1999, Judge Seybolt issued a comprehensive written opinion with respect to Salvatore's accounting and removal as trustee. The judge found numerous instances of Salvatore's self-dealing as Laura's trustee, concluding they constituted a breach of his fiduciary duty to Laura. The judge permanently removed Salvatore as Laura's trustee and surcharged Salvatore $361, 800 for his misuse of trust funds, and assessed $1, 984.34 in costs. In reaching those conclusions, Judge Seybolt stated, in pertinent part:

> N.J.S.A. 3B:14-21 provides that the Court may remove a fiduciary from office when. . . .
>
> > c. he has embezzled, wasted or mis-applied any part of the estate committed to his custody, or has abused the trust in confidence reposed to him.
> >
> > [Salvatore], after spending the better part of two days on the witness stand at this plenary hearing and

having failed to complete that testimony, took it upon himself to refuse to appear in Court for the continuation of the hearing and thereby obstructed the right of counsel for plaintiffs to complete his examination. That conduct is sufficient for the Court to declare a default on that part of [Salvatore] and remove him based upon his failure and refusal to appeal . . . . Nevertheless, in the interest of fairness due the fiduciary and in an effort to reach the merits of [Salvatore's] accountings, the Court will continue to review and comment on the merits of the case.

Throughout [Salvatore's] testimony . . . . he maintained that he was at all times, carrying out the instructions of Laura. The issue of undue influence has yet to be tried and a hearing on that issue is scheduled for September of 1999. In the hearing recently conducted by the Court, the Court will consider [Salvatore's] actions during his trusteeship from May 22, 1997 to May 31, 1998.

[Salvatore], ten days after Laura suffered a stroke on September 9, 1997, called Gilberti and told him that Laura wanted to give [Salvatore] a 50% raise from $100,000 to $150,000. Gilberti prepared the draft of the amended contract and sent it to [Salvatore] with a note indicating that Gilberti had to confirm the matter with Laura. [Salvatore] became furious and screamed at Gilberti's secretary and Gilberti and eventually hung up the phone on him. Schrager advised Gilberti that he had told [Salvatore] not to execute the contract until Fischbein Badillo conferred directly with Laura. [Salvatore] completely disregarded this instruction and arranged, with the help of Drejka and his mother, Serena, to obtain Laura's signature to the amended contract. The amendment was backdated to September 1, 1997 and included an

overlapping period between the first and second compensation agreement from September 1, to November 30 which resulted in [Salvatore] receiving $200,00 for the year of his service. [Salvatore] devoted hundreds of thousands of dollars out of Laura's trust for purchases with Laura's credit cards, checkbooks and cash during a period of time when she was recovering from her stroke. These included purchases from Saks 5th Avenue, Nordstrom's, Bloomingdale's, Fortunoff, Gemelli, Fine Foods, Lord & Taylor, Brooks Brothers, Polo, Ralph Lauren, Sterns, etc. There is no dispute that Serena made most of these charges using Laura's credit cards, without Laura being present and would sign Laura's name to the receipts. Although both Serena and [Salvatore] claim that these purchases were for necessities for Larua, [Salvatore], in his testimony, and Serena. In her deposition, failed to support his claim

From September 1, 1997 until May 31, 1998, $49,500 in cash was withdrawn from Laura's personal checking account during which time Laura's medical condition was significantly diminished. These checks were signed with Laura's signature stamp, one of which was kept in Blairstown with Drejka and the other at Brightwaters with Serena. . . . Both Serena and [Salvatore] admitted that they used cash for their own personal expenditures. [Salvatore] has given no explanation as to what was purchased much less why the Court should approve his use of Laura's case. . . . [Salvatore] spent $12,046 out of Laura's personal checking account to pay for living expenses in Brightwaters. [Salvatore] claims that Laura paid these monies voluntarily, but it is hard to believe at the time of these expenditures that she knew or authorized them.

. . .

[Salvatore] purchased a $20,000 Cartier watch with Laura's funds from a jewelry store with a note indicating it was for her brother. [Salvatore] claims that Laura picked out this watch on a shopping trip to Saks 5th Avenue accompanied by Serena and Drejka. The testimony of Drejka disputed the claim of [Salvatore] and Serena. It was agreed that the watch was given to Henry on December 25, less than 48 hours before his death when it was apparent to everyone that Henry was dying. [Salvatore] paid out of Laura's trust monies, legal fees of $549, 726. This includes the payment of $314,282 to Fischbein Badillo in spite of the fact that no Affidavit of Services was ever submitted in support of these fees as required by *R.* 4:42-9(a)(2). Fischbein Badillo continued to carry out the instructions of [Salvatore] in spite of the fact that it was clear to them based upon Dr. Schlessinger's examination in January of 1998 that she was not competent to make financial decisions . . . . In spite of their concerns with respect to [Salvatore's] request for a new Will and in spite of her obvious lack of capacity, Fischbein Badillo nevertheless drafted the new Will. At the very least, this is a breach of the fiduciary duty of [Salvatore] as a director of the New Niles Foundation. He attempted to divert the estate of Laura from the charities to his mother, Serena. It is obvious to the Court that once Dr. Schlessinger had released his conclusion of lack of competency in January of 1998 and with no contrary opinion being obtained by Fischbein Badillo, that from that period on the services that they continued to render in this litigation were rendered for [Salvatore] individually and not for Laura . . . . [Salvatore's] actions were obviously not for the bene-

fit of Laura, but for the benefit of himself, his mother and his children. . . .

[Salvatore] paid out legal fees of $106,804 to the firm of DeFeis, O'Connell and Rose, a New York firm that was denied admission pro hac vice by this Court on April 9, 1998 and therefore, had not authorization to represent [Salvatore] in New Jersey. . . .

[Salvatore] incurred accounting and investigation fees of $134,285 for accountants and for private investigators to pursue Parkinson after Parkinson had been discharged and his accounting approved by the Court. Therefore, the Court concludes that these monies were used to attack Parkinson for bringing this action rather than to benefit Laura.

Substantial reductions in principal were made by [Salvatore] as trustee to meet the expenses set forth above. This in spite of the fact that the three trust instruments provided that principal could not be used without the written request of Laura. No evidence has been presented to the Court that that was ever obtained by [Salvatore] in spite of these substantial expenditures of principal.

There was $51,000 missing from [Salvatore's] accounting with respect to the Tilo Farms, the business name of Laura's Blairstown residence. Since [Salvatore] elected not to appear at the continuation of the plenary hearing in July, 1999, there was no opportunity to question him on this item. Schrager testified at the plenary hearing that his treatment of compensation agreement in drawing down $200,000 in compensation for slightly more than a year of service was a "breach of fiduciary duty."

For all these reason, the court concludes that [Salvatore] should never again be a fiduciary with

> respect to the trusts or the estate of Laura. For the reasons set forth above, he continued to misuse his relationship to further his own needs and those of his family members under the false premise that he was acting at the request of Laura.
>
> . . . .
>
> The Court finds the conduct of [Salvatore] inexcusable and reprehensible and his permanent removes [Salvatore] at trustee of the revocable trust, Crut I & Crut II of Laura, as Attorney-in-Fact for Laura and as director of the Niles Foundation.
>
> [Citations omitted.]

In further analyzing the misappropriations, the judge assessed surcharges against Salvatore in the amount of $361,800. An order and judgment memorializing those findings and conclusions was executed on August 24, 1999.

Thereafter, Salvatore refused to attend scheduled, court-ordered depositions and refused to attend scheduled, court-ordered depositions and refused to appear at the undue influence trial that commenced on September 21, 1999. The undue influence trial continued on September 22 and 23, 1999, October 25, 26, 27 and 28, 1999, November 1, 3, 4, 15 and 16, 1999, and concluded on November 17, 1999. Based on Salvatore's refusal to provide discovery and his refusal to attend the trial or be available as a witness, the judged ordered that Salvatore's pleadings be struck and default be entered against him.

On January 10, 2000, Judge Seybolt issued a written decision concluding, *inter alia*, that there was "no clearer case of undue influence than the one presently before this court." The judge declared all modifications of the three trust agreements executed on May 21, 1997, as well as all amendments to Laura's will and powers of attorney executed thereafter, to be "null and void." The court reinstated all

fiduciaries appointed by Laura prior to May 21, 1997, and appointed Parkinson as Laura's guardian. The findings and conclusions of the judge were memorialized in an order for judgment entered on January 21, 200.

In reaching these conclusions, Judge Seybolt stated, in pertinent part:

> Upon Laura's return to the Blairstown, [Salvatore] . . . employed Gerald Schrager and Larry Gilberti . . . to do legal work regarding Laura's estate. The existing trust documents were brought to Blairstown by Schrager and Gilberti along with [Salvatore] and reviewed with Laura Niles on April 1, 1997 . . . . For the most part, this interview showed that Laura could respond to questions and did know the persons she had previously included in her estate plan. Laura expressed an interest in transferring the Florida condominium to Serena although she was clear that she did not want to retain Parkinson, Selby or Lamb. She was not questioned to any extent for the reasons. Although Laura's answer for the most part seem responsive, neither Gilberti nor Schrager pursued the reasoning for the changes and never, outside the presence of [Salvatore], discussed his qualifications to be trustee of her rather large estate or director of her foundation . . . . When asked why she was so made at Mr. Parkinson , her response was, "Because he cheated me." When you asked what makes you believe he cheated you, she responded, "Because there is not trust made of Carol's kids and he said he did. I was very surprised at this reaction." She further indicated that "He is not very trustworthy. I was so surprised." At the conclusion of the minutes, Gilberti asked Laura: "How did you become aware of Mr. Parkison 'cheating' you?" Laura responded, "Mrs. Bono, Mrs. Niles, she said that he has not been on the up and up. She's been in business. She knows." It was obvious to the Court at

this point that Serena and [Salvatore] had successfully worked their influence.

On May 8, 1997, an estate planning questionnaire was prepare and sent to Laura Niles. It was completed and sent back with handwritten changes; obviously not in her handwriting. A rather startling additions was included in the last page of the answer [.] . . . In someone's handwriting other than Laura Niles, Salvatore Bono was to receive $1,000,000 to take as he wished. It was testified by Mr. Gilberti that he and Schrager recommended against this bequest as it would not look good. The word "void" was added over the note on this page by someone else in different handwriting from the bequest.

Documents were prepared and presented for signature by Laura Niles at Blairstown on Wednesday, May 21, 1997. A transcript was made of this session consisting of 73 pages and a videotape was also made of this session. Dr. Leslie Schlessinger was called upon to appear and give his opinion about Laura's competency. . . . [Salvatore] was not present in the room as far as the transcript and the videotape show. Laura asked for [Salvatore] so the Court concludes that he was present that day in Blairstown and had the opportunity to speak to Laura before the session began.

. . . .

Laura's competency on May 21, 1997 is not an issue, but the undue influence of Serena and [Salvatore] is very much and issue. A review of the transcript and videotape of May 21, 1997 indicates that Laura was answering questions, but was not giving directions . . . . Most of Laura's answers to Mr. Gilberti's questions were one word answers, usually "yes." On occasion, she would ask for [Salvatore]. She signed the documents as

she was told. A view of the videotape indicated that Laura was frail and elderly at the time of the signing of the documents on May 21, 1997 and very cooperative in completing the task.

. . . .

Upon the instructions of [Salvatore], a second modification and restatement was prepared for execution by Laura on August 15, 1997 at the offices of Fischbein, Badillo in New York City. A transcript was prepared of that meeting. The officers and directors of Laura J. Niles Foundation, Inc. had not resigned in accordance with the instructions sent by Schrager and Gilberti under a very weak signature of Laura on May 21, 1997. The purpose of the modification of August 15, 1997 was to replace the Laura J. Niles Foundation with a new foundation. When asked by Mr. Gilberti the reason for the change, Laura replied, "Well, because there is a certain trustee that we feel he wants too much, that he is not being quite honest." Note the reference to "we feel".

. . . .

Now before this Court is the issue of the alleged undue influence of Serena Bono and [Salvatore] in connection with the 1997 amendments to the Laura Niles three trusts, her last Will and Testament and the new medical power-of-attorney. Testimony was presented over twelve days . . . with closing arguments on November 17, 1999. This Opinion of the Court now deals with the remaining issue. [Salvatore] never appeared at this hearing and on the first day of testimony, his attorney moved to be relieved and his request was granted. [Salvatore] was never thereafter heard from and is in default with respect to the allegations of this undue influence. Serena Bono was represented . . . and she appeared and gave testimony in here behald.

. . . .

In determining whether a particular individual has been impelled to act under duress, all attendant circumstances including the age, capacity and relation of the parties must be considered as well as the exigencies of the situation in which the alleged victim finds himself.

In [Matter of will of Liebl, 260 N.J. Super. 519 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993)], the Court summarized the two elements necessary to give rise to a presumption of undue influence. The first being a confidential relationship between the testator and a beneficiary where the trust is reposed by reason of the testator's weakness or dependence or where the parties occupy relations in which reliance is naturally inspired or the fact exists. The second element must be the presence of suspicious circumstances which in combination with the confidential relationship with shift the burden of the proof to the proponent. Such circumstances need be no more than slight.

. . . .

In the late 1980's, both Henry Niles and Laura Niles were in their late 70's and were relying on others for assistance in their daily living and in their financial decisions. Henry, although two years younger than Laura, was weaker physically than Laura, had no social life and rarely left his home in Brightwaters. Laura, on the other hand, attended dog shows regularly, had an apartment in New York City, a circle of friends and an interest in horses as well as dogs. However, Laura had persons caring for her, her Blairstown property and her animals on a full-time basis. She no longer drove a car and was becoming more dependent upon others.

. . . .

By 1997, Laura was 86 ½ years of age an dependent on the full-time nurses and the full-time assistance of Gregory [Drejka] and Romana [Baranska]. She went to the Florida condominium to stay with Henry and Serena during February and March of 1997. While there, she received news of the sudden suicide death of her goddaughter and favorite, Carol Boehm. This was very upsetting to Laura and at this time when this frail, elderly woman was most vulnerable, Serena, with the help of her son, [Salvatore], who also visited Florida at this time, increased the negativism directed at Parkinson and the need for someone else to look into her finances. Upon Laura's return to Blairstown at the end of March, 1997, [Salvatore] had arranged for attorneys at Fischbein, Badillo (Schrager and Gilberti) to remove Parkinson and to make extensive changes in Laura's estate plan. Notes of the meetings with Gilberti and Schrager confirm that Laura now, in her weakened condidtion, had a state of mind that Parkinson was dishonest and had been stealing from her. This confirms that she was taken advantage of in her weakened condition, to turn her mind away from her trusted advisor, Parkinson, and to place that trust into someone now. Serena had told Laura that with her business experience, she recommended her son, [Salvatore], who had now befriended Laura and convinced Laura that he was the one to handle here financial decisions. This was done without any know qualifications of [Salvatore] to be placed in a position to handle suck a large amount of investments. Numerous documents were prepared and presented to Laura for execution on May 21, 1997. The videotape clearly shows that Laura was in a weakened condition and she had very little input into these wholesale changes presented to her at that time. Her answers as previously indicated were one word answers and showed very little, if any, original thought. Dr.

Schlessinger was present on May 21st and although he found her competent enough to know what she was doing, he concluded that she was suffering from some degree of dementia. He found her to be a frail, elderly woman who relied on maximum help with others with her activities of daily living and had significant impairments with respect to making complex decisions. Nevertheless, Laura signed all the documents of her assets from Parkinson to [Salvatore] and made numerous other changes previously outlined in this Opinion.

After, poisoning Laura's mind about Parkinson, [Salvatore], the one person whom Serena recommended that Laura place her confidence in, began to include himself as an object of her bounty.

The Court concludes that the apparent age and frailty of Laura Niles, coupled with her vulnerability and complete dependence on others, created a confidential relationship with her sister-in-law, Serena and Serena's son, whom Serena had recommended as the proper person to give her advice. Witnesses from . . . Brightwaters, Blairstown and Florida convinced the Court that Serena dominated these households and those that worked in the household of these three localities. Laura was included in this dominance when both were residing at the same locale. Serena's dominance, coupled with Laura's weakness, creates the confidential relationship. Examples of the suspicious circumstances are referred to throughout this Opinion. When Laura returned from Florida Blairstown at the end of March, (1997), Serena ordered through Greg Drejka that Parkinson was not to communicate with Laura. True, Laura never attempted to call Parkinson, but at this time, she never made her own phone calls, but had others call for her and she was now convinced that Parkinson had been deceitful and was cheating her. The attempt by (Salvatore) to include

himself in Laura's trust for $1,000,000 and his children for $500,000 each, clearly shows the intention of [Salvatore], who took complete charge over Laura's financial situation. The court finds that not only has the plaintiff satisfied the burden of proof, but has provided the Court clear and convincing evidence which has not been rebutted that undue influence occurred and that all documents executed by Laura Niles beginning with the execution of the ten documents on May 21, 1997 and any documents executed in preparation for those modifications, are void as a matter of law, on the basis of undue influence.

. . . .

Laura suffered a severe stroke on September 9, 1997 and upon release from rehabilitation several weeks later, was taken to Brightwaters to live under Serena's dominance. Serena, who requested funds to care for Laura , had access to Laura's credit cards and through here son, [Salvatore], access to Laura's checking account. A $ 70,00 white Mercedes sedan was purchased by [Salvatore] of Laura, who hadn't driven in years and who thought it was a novelty.

Henry Niles died December 27, 1997 and Serena was faced with the termination of the monthly living allowance. Further amendments to the trust were contemplated by Serena and [Salvatore] and Dr. Schlessinger was then called in. Dr. Schlessinger, in his January, 1998 exam concluded that Laura J. Niles was no longer competent to execute documents with respect to her assets and her estate. This did not discourage Serena and [Salvatore]. [Salvatore] then requested that Gilberti prepare a third modification of the trust agreement which totally eliminated the Foundation as the residual beneficiary and distributed the residue of her estate (in excess of $20,000,000) outright to Serena. Gilberti admitted that he never conferred with Laura on this

> change, but nevertheless drafted the third modification. He began to have his doubts when [Salvatore] would not agree to confirmation from Laura and this third modification was never executed. This however clearly shows the state of mind of Serena and [Salvatore] who stand accused of undue influence of Laura. In addition, [Salvatore], who had criticized Parkinson for the management fees he had taken from the trust, managed to get an amendment of his services contract with Laura increased from $100,000 to $150,000 and in fact, took $200,000 in the last full year that he served as trustee.
>
> It is this Court's conclusion that there is no clearer case of undue influence than the one presently before this court.

A judgment memorializing the findings and conclusions in Judge Seybolt's January 10, 2000 written opinion was entered on January 21, 2000. In addition, that judgment permitted plaintiffs to file a surcharge and damages application for judgment against Serena and Salvatore for counsel fees and compensatory damages.

Pursuant to that judgment, Parkinson and the Foundation moved against Serena and Salvatore for imposition of attorneys fees, costs and compensatory damages. The trial court granted the applications and entered and amended final judgment on March 24, 200, assessing a total superceding surcharge against Salvatore in the amount of $805, 727; a surcharge against Serena in the amount of $162,014; $314,282 for legal fees incurred in connection with the litigation, for which Serena and Salvatore were made jointly and severally liable; and $50,000 in compensatory damages for which Salvatore and Serena were also jointly and severally liable.

Plaintiffs had sought legal fees and compensatory damages against Serena and Salvatore in the total amount of

$2,987,106, consisting of legal fees and costs of $2,199,077, and compensatory damages in the amount of $788, 029. In considering plaintiffs' application and rendering his decision at the March 24, 2000 hearing Judge Seybolt stated, in pertinent part:

> This court will first address the issue of compensatory damages. The court is convinced that [Salvatore] should not be permitted to retain the $200,000 in compensation for being trustee, because he attained the position as a result of undue influence.
>
> As to the other requested compensatory damages, the court affirms its decision in the earlier opinion. The court surcharged $50,000 against Salvatore Bono for improper credit card, cash and check expenditures, because those funds were used for Mr. Bono's personal gain. Serena Niles had access to those funds as a result of her undue influence and should not be able to benefit. In the August 3, 1999 opinion, the court found that much of the credit car use was not for Laura, but was for Serena and the Bono family. These sums were used with gross carelessness or indifference to Laura's wishes. Since both [Serena] and [Salvatore] benefitted from those charges . . . they shall be jointly and severally liable for that $50,000. This is not $50,000 in addition, 50,000 already surcharged against [Salvatore] is the same $50,000, jointly and severally.
>
> The court charged [Salvatore] 35,000 for investigation fees. There has been no demonstration that Serena Niles directed Salvatore Bono to initiate this investigation. Therefore, Serena Niles will not be surcharged for those fees. [Salvatore] will remain surcharged for those.
>
> The court charged [Salvatore] 35,000 for investigation fees. There has been no demonstration that Serena Niles directed Salvatore Bono to initiate this investigation.

Therefore, Serena Niles will not be surcharged for those fees. [Salvatore] will remain surcharged for those.

In the earlier opinion, the court did not surcharge [Salvatore] for accounting fees. However, based upon the findings of undue influence, [Salvatore] . . . should be charged $99, 276 for those accounting fees . . . However, there has been no finding that [Serena] directed [Salvatore] to do these actions. Therefore, these funds will not be surcharged against [Serena].

In the earlier decision, the court reserved decision on whether to surcharge [Salvatore] for the Fischbein Badillo legal fees . . .

It is my understanding that they are not seeking . . . additional counsel fees from the trust, but nevertheless were paid sums of money for their alleged representation of Laura Niles. These fees arose from amendments made to the trust and trust amendments resulted from Salvatore Bono and Serena Niles' undue influence. Therefore, the Fischbein, Badillo fees shall be surcharged to Serena Niles and Salvatore Bono jointly and severally.

Plaintiff[s] move for Salvatore Bono and Serena Niles to be surcharged for all of the legal fees resulting from this case. Based on the [In re Landsman, 319 N.J. Super, 252 (App. Div.), certif. denied, 161 N.J. 335 (1991)] decision this court believes that it is authorized to compel [Salvatore] and [Serena] to pay their own legal fees, because it would be inequitable for the court to conclude that the estate should have to pay the legal fees for the individuals who unduly influenced. Therefore, Serena Niles, will be surcharged $162,014 for the time fees of the Novice firm [, her attorneys].

[Salvatore] has previously been surcharged $106,804 for the frees of DeFeis, O'Connell and Rose. In the

earlier proceeding the court declined to surcharge [Salvatore] for the services provided by Sills, Cummis. However, since those fees were generated to defendant [Salvatore's] position gained as a result of undue influence, the court will now surcharge [Salvatore] $128,640 representing Sills, Cummis fees and the $236,007 for the Cohn Lifland fees. These fees directly resulted from [Salvatore's] attempt to defend his undue influence. This sum should not be paid by trust.

Mr. Parkinson also moves for [Serena] and [Salvatore] to be surcharged for the attorney's fees of other parties in this case. This Court does not find any basis in Landsman to shift the attorney's fees from the other parties to [Salvatore] and [Serena]. In Landsman, the Appellate Division did not state that a party found to have committed undue influence is bound to pay the attorney's fees of all parties involved. The court stated the party found guilty of undue influence must bear its own legal expenses.

. . . .

I am not surcharging [Salvatore] the $19,000 [loss] for the Mercedes. Because it was purchased for Laura Niles at a time when [it] becomes property of the estate, therefore, it becomes an asset of the trust. Whether it was lost value, whether it was a lousy investment, perhaps, I am not going to surcharge $19,000.

[Other citations omitted.]

The amended final judgment entered on March 24, 2000, memorializes the final rulings of Judge Seybolt. In August 1998, Laura slipped into a coma from which she never recovered.

On appeal, Salvatore presents the following arguments for consideration:

POINT I

THE SURCHARGES, ATTORNEYS' FEES AND DAMAGES IMPOSED AGAINST BONO IN THE FINAL JUDGMENT MUST BE VACATED BECAUSE PARKINSON LACKED STANDING TO OBJECT TO THE ACCOUNT AND HE HELD NO CLAIM THAT WAS RIPE FOR ADJUDICATION. THE ORDER SETTLING PARKINSON'S ACCOUNT MUST ALSO BE VACATED.

POINT II

THE FINAL JUDGMENT INVALIDATING THE MAY 21, 1997 LAST WILL AND TESTAMENT OF LAURA J. NILES WHILE SHE WAS ALIVE MUST BE VACATED AS THAT CLAIM WAS NOT RIPE AND THE ORDER REMOVING BONO AS TRUSTEE OF THE NILES FOUNDATION, INC., A NEW YORK NOT-FOR PROFIT CORPORATION, MUST BE VACATED FOR LACK OF SUBJECT MATTER JURISDICTION.

A. The Final Judgment Erroneously Purports to Invalidate any Testamentary Instrument Not Submitted for Probate and Such Decree Must be Vacated.

B. The Chancery Division's Jurisdiction over New Jersey Trusts and Trustees Did Not Extend to Removal of a Director of a New York Not for Profit Foundation.

POINT III

SELVAGGI WAS IMPROPERLY APPOINTED AS GUARDIAN AD LITEM AND TEMPORARY TRUSTEE OF LAURA NILES ON THE *EX-PARTE*

APPLICATION OF PARKINSON, THIS APPOINTMENT PREJUDICED LAURA NILES AND BONO AND THEREFORE THE JUDGMENT MUST BE REVERSED.

A. The Ex-Parte Appointment of Selvaggi as Guardian at the Behest of Parkinson Was Not Authorized as a Matter of Law and The Appointment Cannot Stand.

B. Selvaggi's Selective Invocation of the Attorney Client Privilege and His Inaccurate Report Prejudiced the Rights of Laura Niles and Bono.

1. Selvaggi's Conduct in Waiving The Attorney-Client Privilege Prejudiced The Rights of Laura Niles.

2. Selvaggi's Conduct in Preparing a Guardian Ad Litem Report Which Was Inaccurate, His Refusal to Release His notes of the Interviews After Witnesses Certified Statements Ascribed to Them Were Inaccurate or Never Said, Caused The Court to Find a Prima Facie case of Undue Influence And Prejudiced Bono.

POINT IV

THE COURT BELOW ERRED IN SUMMARILY REMOVING BONO AS TRUSTEE PENDING FINAL DETERMINATION BECAUSE THERE WERE DISPUTED ISSUES OF MATERIAL FACT.

POINT V

THE DECISION TO ENTER DEFAULT WITHOUT PROPER NOTICE, AS REQUIRED BY RULE 1:6-3, THE FAILURE TO CONSIDER LESS DRASTIC REMEDIES, AND THE TOTAL EXCLUSION OF BONO AND HIS ATTORNEY FROM ANY PARTICIPATION IN THE PROOFS HEARING AND DAMAGES HEARING, VIOLATE HIS DUE

PROCESS DAMAGES HEARING AND HIS RIGHTS UNDER NEW JERSEY LAW AND REQUIRE REVERSAL.

B. The motion for Entry of Default Was Defective as a Matter of Law and the Application Should Have Been Summarily Denied.

C. The Lack of Sufficient Notice and an Opportunity to Be Heard in Person or Through Counsel Prior to the Entry of a Money Judgment Exceeding One Million Dollars Constituted a Deprivation of Bono's Rights to Due Process of Law. The Court Below Abused its Discretion by Failing to Consider Less Severe Sanctions and in Precluding Participation in the Damages Phase of the Trial.

POINT VI

THE DENIAL OF THE MOTION FOR JUDGE SEYBOLT'S RECUSAL IS REVERSIBLE ERROR BECAUSE JUDGE SEYBOLT HAD AN INTEREST IN THE OUTCOME OF THE CASE AND WAS LITIGATION AGAINST BONO IN THE FEDERAL CIVIL RIGHTS AND RICO CASE.

B. This Court Should Take Judicial Notice of Bono's 1983 and Civil RICO case Against Judge Seybolt When Considering Judge Seybolt's Refusal to Recuse Himself from This Case.

B. Judge Seybolt's interest in the Outcome of the Action He Presided Over, Coupled With His Taking a Position Concerning the Merits of Bono's Complaints About Him, Required His Recusal to Maintain Confidence in the Judiciary.

1. The requirement in Canon 3(c) of the Code of Judicial Conduct, Which Requires a Judge to Recuse Himself Whenever His Impartiality Might

Reasonably be Questioned, Is To Be Strictly Enforced and Any Doubts Resolved in Favor of Recusal.

2. A Reasonably Objective Observer or Member of the Public, Knowing All of the Facts About Judge Seybolt's Conduct After Becoming a Defendant in the Federal Lawsuit Might Question his Partiality and Therefore Recusal Was Mandated.

A. Judge Seybolt's Filing of a Motion to Dismiss Bono's Complaint and Taking a Position as to its Merits Would Reasonably be Perceived as His Taking a Position Against Bono and Aligning Himself With the Other Litigants Who Were Also Joined in the Federal Lawsuit.

B. Judge Seybolt's Complete and Drastic Change in His Perception of What the Videotape of Laura Niles Showed About her Condition, Which Occurred After He Received the Amended Complaint in the Federal Lawsuit Initiated by Bono, Are such That a Reasonable Observer Might Question His Impartiality.

C. The Extreme Rulings Made by Judge Seybolt Against Bono After He Filed The Federal Lawsuit Are Such That a Reasonable Objective Observer Might Question His Impartiality.

POINT VII

THE JUDGMENT SHOULD BE VACATED AND BONO GIVEN AN OPPORTUNITY TO LITIGATE THE UNDUE INFLUENCE ISSUE BEFORE A DIFFERENT JUDGE BECAUSE THE RECORD DEMONSTRATES THAT THERE IS MERIT TO BONO'S ASSERTION THAT THE INSTRUMENTS WERE THE PRODUCT OF LAURA NILES' FREE

WILL, WITH THE AID OF HER INDEPENDENT COUNSEL.

A. The Dispositions Made by Laura Niles Were Presumptively Valid and Enforceable.

B. Only Influence Which is So Strong as To Destroy the Free Agency of the Testator Can Rebut the Presumption of Validity of the Instruments that Person Signed.

C. Parkinson Failed to Establish that Each and Every Instrument and Will Which Parkinson Challenged Was the Product of Undue Influence.

1. Laura Niles' Mental Acuity, Strength of Will And Emotional Health Both Before And After The 1997 Florida Trip and Including The Times When The Documents In Question Were Executed Show that She Was Not The Victim of Undue Influence.

2. Laura Niles' Representation by Independent Counsel at the Time the Trust Amendments Were Carried Out Undermines Parkinson's Undue Influence Claim.

3. Laura Niles' Independent Complaints About Parkinson, Selby, and Lamb Demonstrate That Her Decision to Replace Them Was Not The Result of Undue Influence.

POINT VIII

THE AWARD OF MONEY DAMAGES MUST BE VACATED BECAUSE PARKINSON FAILED TO SHOW HE WAS DAMAGED AND IT WAS IMPROPER TO DIRECT SALVATORE BONO TO PAY ATTORNEY FEES INCURRED FOR REPRESENTATION OF LAURA NILES AND THE

TRUSTS, AND TO AWARD COMPENSATORY DAMAGES TO LAURA NILES, WHO WAS NOT A PARTY TO THE ACTION.

On appeal, Serena presents the following arguments in support of her appeal of our consideration:

POINT I

THE EVIDENCE BEFORE THE TRIAL COURT WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A FINDING OF UNDUE INFLUENCE AS TO THE DEVISE OF THE FLORIDA CONDOMINIUM.

POINT II

THE TRIAL COURT ERRED IN ASSESSING FEES AND COSTS AGAINST SERENA NILES.

In their cross-appeals, the Foundation and Parkinson present the following arguments:

THIS COURT SHOULD DIRECT THE TRIAL COURT TO ENTER JUDGMENT JOINTLY AND SEVERALLY AGAINST SAL BONO AND SERENA NILES IN THE AMOUNT OF $2, 987, 106.

A. The Estate Is Entitled to Restitution From the Bonos For All Legal Fees Incurred As A result of Their Undue Influence.

B. The Unauthorized Expenditures.

C. The Damages For The Commissions And The Accounting and Investigators' Fees Assessed Against Salvatore Bono Should be Affirmed For The Reasons Stated By The Trial Court; However, The Trial Court Erred By Not Assessing These Same Damages Against Serena Bono Niles.

After carefully reviewing the record in the light of the written and oral arguments presented by the parties, we conclude that the claims advanced by Salvatore and Serena are without sufficient merit to warrant extensive discussion in this opinion, *R.* 2:11-3(e)(1)(A) and (E), and we affirm substantially for the reasons articulated by Judge Seybolt in his thoughtful and comprehensive written opinions dated August 3, 1999 and January 10, 2000 and in his oral opinion delivered on March 24, 2000. The findings of the judge are supported by substantial, credible evidence contained in the record, *Rova Farms Resort v. Investors Ins. Co.*, 65 *N.J.* 474, 484 (1974), and his conclusions predicated on those findings are legally sound. *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145, 151-53 (1982). We add the following.

Salvatore's argument that Parkinson had not standing to object to Salvatore's accounting, although not raised below, is without merit. Parkinson clearly had a right, and thus had a standing, to object to Salvatore's accounting. The litigation was commenced when Parkinson, as trustee of the Foundation, filed a verified complaint, seeking not only an allowance of the settlement of his account of the trust assets, but also seeking appointment of a guardian ad litem to protect Laura's interest from acts of improper influence by Salvatore and Serena, made possible because of Laura's frail health. Since Parkinson was responsible for the court's order directing Salvatore's accounting, Parkinson could not be deemed as a stranger or interloper to the action. As the person who for years had taken care of Laura's financial affairs and had acted as trustee and fiduciary, Parkinson had a direct stake in protecting Laura's estate from the consequences of Salvatore's manipulation and improper influence. Salvatore's reference and reliance on an analytical extrapolation from *N.J.S.A.* 3B:14-4 is both inappropriate and misplaced. There can be no question that Parkinson was an "interested person" and, as such, was clearly entitled by *R.* 4:87-8 to file exceptions to Salvatore's accounting.

Salvatore's arguments that the Probate Part lacked jurisdiction to invalidate Laura's 1997 will because only a probated will contest could have invoked the court's jurisdiction, is without merit. The 1997 will was vacated as a result of the court's determination that it's execution was not a product of Laura's own free will but, rather, the result of the undue influence of Serena and Salvatore. Nothing about these proceedings and subsequent findings invoked or required the probate procedures. Vacation of the 1997 will and the other documents was the logical remedy once the finding of undue influence was made. The court properly acquired jurisdiction over each aspect of Laura's affairs tainted by the undue influence.

Although it appears the trial court had no jurisdiction over the Niles Foundation, which was incorporated in the state of New York on August 14, 1997, the invalidation of the 1997 estate plan and documents, and reinstatement of the previous estate plan, deprived the 1997-created Niles Foundation of any interest in Laura's estate, as the 1992-created Foundation was the residual beneficiary of Laura's assets under 1992 will. Thus, although the trial court had no authority to remove Salvatore as a director of the 1997 New York charitable corporation, that entity no longer had a purpose, funding source, or link to Laura.

There was nothing improper in the appointment of Selvaggi as guardian ad litem for Laura. The procedures used conformed to applicable court rules. *See R.* 4:67; *R.* 4:83; *R.* 4:87-1(a). Additionally, as Laura's duly appointed guardian ad litem, Selvaggi clearly had the right to exercise or waive the attorney-client privilege Laura enjoyed as long as doing so was in her best interest. The record is clear that Selvaggi acted in Laura's best interest at all times.

Salvatore's reliance upon *Wolosoff v. CSI Liquidating Trust,* 205 *N.J. Super.* 349 (App. Div. 1985), to support his contention that his summary removal on September 24, 1998

as trustee pending final disposition was improper without and evidential hearing, is misplaced. Initially, we note that this claim is moot, because Salvatore was eventually permanently removed after a full plenary hearing in which he chose not to participate. In *Wolosoff, supra*, the trustees were permanently removed on the basis of affidavits and oral arguments. 205 *N.J. Super.* at 364-66. Here, Salvatore's initial removal on September 24, 1998, was temporary, and was largely based upon a comprehensive report from the guardian ad litem.

We also conclude that given Salvatore's conduct during the proceedings the trial court, the trial judge did not abuse his discretion in finding Salvatore in default, striking his pleadings, and entering judgment against him. Salvatore refused to appear for the continuation of his deposition, despite a court order requiring him to do so. The record is replete with other instances of Salvatore's lack of participation and cooperation with the court and counsel. The trial judge exercised remarkable restraint throughout and displayed a clear and constant intent to provide Salvatore ample and adequate opportunity to be heard. Salvatore's claims of inadequate notice are meritless; he made it clear that he had no intention of appearing before Judge Seybolt for any purpose. Salvatore's own actions and conduct decry his current complaints.

Although the trial judge probably should have permitted Salvatore's counsel to participate in the cross-examination of witnesses on the issue of damages, we find no prejudice to Salvatore in that regard. The record is clear that Salvatore wanted to discharge his counsel and did not authorize such participation. Moreover, Serena was in the same position as Salvatore with respect to the undue influence allegations; Serena's counsel fully cross-examined all of the witnesses as to both liability and damages.

We are satisfied Judge Seybolt properly exercised his sound discretion in denying Salvatore's application for recusal; recusal rests in the sound discretion of the trial judge

whose impartiality is challenged. *Panitch v. Panitch*, 339 *N.J. Super.* 63, 66 (App. Div. 2001); *Jadlowski v. Owens-Corning*, 283 *N.J. Super.* 199, 221 (App. Div. 1995), *certif. denied.*, 143 *N.J.* 326 (1996). The record more than adequately demonstrates that Judge Seybolt presided over this matter even-handedly, exhibiting no bias whatsoever. The record also clearly reflects that Salvatore's conduct in instituting the federal action was a tactic improperly designed to create a conflict where no existed and to obfuscate the proceedings.

The findings of the exercise of undue influence by Serena and Salvatore on Laura, and the imposition of fees, costs and surcharges against Serena and Salvatore are fully supported by the evidence contained in the record. Salvatore's claim that Parkinson was obliged to prove that he personally suffered monetary damages misconstrues that nature of the action. Parkinson was not seeking to recover for an injury to himself. Rather, his action was brought initially as a complaint to settle his accounting and for appointment of a guardian ad litem to investigate the necessity to protect Laura from undue influence. At no point was Parkinson seeking to redress a wrong committed against him personally. The proofs at the hearings were taken to resolve questions of whether the actions of Salvatore and Serena had resulted in damages to Laura's estate. Accordingly, Parkinson was under no obligation to prove that he had suffered damages personally.

The surcharges for attorneys' fees paid to the Fischbein Badillo and DeFeis, O'Connell and Rose law firms were proper because they were only incurred because Salvatore sought legal representations Laura, they did so at Salvatore's behest. Ultimately, those services were incurred not for Laura's benefit but for the benefit of Salvatore and Serena. Certainly, the incurrence of those fees constituted a breach of Salvatore's fiduciary duty and were recoverable.

Additionally, viewing the matter from the equitable perspective required by *Landsman, supra,* the exercise by Serena of undue influence to procure the results manifested by the 1997 invalidated documents, justified imposition of a joint and several obligation upon Serena for those counsel fees on equitable principles, notwithstanding her lack of "fiduciary" status. 319 *N.J. Super.* at 276.

It was clear from the evidence that Serena was the driving force behind the changes Laura made to her estate plan documents in 1997 so as to benefit herself, Salvatore and their family members. Moreover, it is Serena who initiated the undermining of Parkinson by her constant baseless comments, criticisms, and accusations of his financial treachery and dishonesty. We also find no basis or justification in the record for imposing upon Laura's trust the obligation upon Serena for those counsel fees on equitable principles, notwithstanding her lack of "fiduciary" status. 319 N.J. Super. at 276.

It was clear from the evidence that Serena was the driving force behind the changes Laura made to her estate plan documents in 1997 so as to benefit herself, Salvatore and their family members. Moreover, it is Serena who initiated the undermining of Parkinson by her constant baseless comments, criticisms, and accusations of his financial treachery and dishonesty. We also find no basis or justification in the record for imposing upon Laura's trust the obligation to pay Serena's counsel fees.

Parkinson and the Foundation contend the trial court assessed inadequate damages against Salvatore and Serena such that Laura's estate was not made whole. Although, in our view, the trial court's reference to Landsman, supra, as providing inadequate authority for imposition of all counsel fees against a purveyor of undue influence, was too narrow, the record submitted does not support plaintiffs' claim. Plaintiffs' application for the assessment of those counsel

does not disclose precisely what services rendered, for what purpose, and why the estate was obligated by the court to pay them.

We also accord deference to the trial judge's exercise of discretion in setting the amount of compensatory damages. The record contains only a list of the charges from the credit card statements indicating where the purchases had been made, and the amount of the checks written on Laura's account to cover those charges. No other details were made available concerning the precise nature of the purchases, some of which could reasonably have been necessary for Laura's maintenance. In the absence of more specific proof, we defer to the discretion of the the trial judge and his feel for the case.

Affirmed.

IN THE MATTER OF THE TRUST CREATED MARCH 31, 1992 BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE;

TRUST CREATED MARCH 31, 1992, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE; and AMENDED JUDGMENT

TRUST CREATED AUGUST 23, 1994, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE.

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WHEREAS this matter was commenced by way of a Verified Complaint filed by Geoffrey M. Parkinson on January 20, 1998; and

WHEREAS on January 26, 199, the Laura J. Niles Foundation, Inc., filed a Verified Complaint as well, which was consolidated with the Parkinson Complaint by way of order dated March 12, 1999, and which was subsequently superceded by a First Amended Verified Complaint, and

WHEREAS by order of the Court, defendant Salvatore Bono submitted accountings in this action; and

WHEREAS the Court conducted a hearing on April 21, May 3-4, and July 12,-15 to consider said accountings and exceptions thereto filed by plaintiffs; and

WHEREAS at the conclusion of said hearing this Court entered an opinion and order dated August 24, 1999, in which it (a) found that Salvatore Bono had committed numerous acts of malfeasance, negligence, and self-dealing as trustee of Laura Niles, (b) permanently removed Salvatore Bono as trustee and fiduciary to Laura J. Niles; (c) removed Salvatore Bono as a director of the Niles Foundation, and (d) imposed sanctions against Salvatore Bono in the amount of $361, 800, without prejudice to plaintiffs' right to request further surcharges at the conclusion of the merits trial; and

WHEREAS on the first day of the plenary hearing on the merits of this matter (September 21, 1999), this Court found Salvatore Bono in default for a variety of reasons set forth on the record, including, in particular, his repeated failures to appear for court-ordered depositions and his failure to appear at trial; and

WHEREAS the Court thereafter proceeded with a plenary hearing on the merits of the allegations in the consolidated complaints, with the sole defendant being Serena Niles; and

WHEREAS this Court issued & Letter Opinion dated January 10, 2000 in which it made findings of fact and conclusions of the law based upon the testimony of the witnesses and the numerous exhibits into evidence; and

WHEREAS the Court found, among other things, that (a) as of January 1997, Laura Niles suffered from significant mental impairments that made her vulnerable to undue influence; (b) as of January 1997, Salvatore Bono and Serena Niles had developed a confidential relationship with Laura Niles; (c) suspicious circumstance exited sufficient to shift the burden of proof to the defendants, (d) Salvatore Bono and Serena Niles abused the trust and confidence Laura Niles placed in them by (among other ways) repeatedly telling her falsely that Mr. Parkinson was "cheating" her, "lying" to her, and "couldn't be trusted"; (e) Laura Niles, because of her mental and physical limitations at the time, was unable to resist these false and defamatory suggestions; (f) as a result of undue influence exerted upon her by Salvatore Bono and Serena Niles, Laura Niles signed the subject documents on May 21, 1997 and August 15, 1997, which, among other things, transferred control over her estate to Salvatore Bono; and (g) working in concert, Salvatore Bono and Serena Niles further abused the trust and confidence Laura Niles paced in them by, among other things, attempting further changes to her will, using her credit cards, checks and cash for

personal expenditures, obtaining improper and unauthorized compensation for Salvatore Bono, and using the funds in the trusts for wholly improper purchases; and

WHEREAS Salvatore Bono's and Serena Niles' conduct is the proximate cause of substantial economic harm to Laura Niles, including substantial legal fees paid during the pendency of this proceeding; and

WHEREAS plaintiff's complaints request the imposition of damages, fees and costs; and

WHEREAS it is appropriate and reasonable to require Salvatore Bono and Serena Niles to (a) bear some of the burden of the legal fees and costs paid in connection with this litigation, and (b) compensate the trusts for additional damages caused by their conduct; and

WHEREAS the Judgment previously entered by the Court in this matter on January 21, 2000, expressly provides that plaintiff's attorneys "may move before this Court by January 28, 200, on notice to all remaining parties, returnable Friday February 25, 2000, directing the defendants, Salvatore Bono and Serena Niles, to pay legal fees, costs and compensatory damages to the Laura J. Niles trusts"; and

WHEREAS plaintiffs having moved for such relief by a way of motion with notice to the remaining parties; and

FOR ALL of the reasons set forth in the Letter Opinion dated January 10, 2000 and for the additional reasons stated by the Court on the record on March 24, 2000;

ORDERED, ADJUDGED, and DECREED as follows:

A. Judgment is hereby entered in favor of plaintiffs Geoffrey M. Parkinson and the Laura J. Niles Foundation, Inc., defendants Salvatore Bono and Serena Niles with respect to all allegations of undue influence in the Verified Complaint of Geoffrey Parkinson and with

respect to Counts One and Two of the First Amended Complaint of the Laura J. Niles Foundation, Inc.

B. Declaratory and injunctive relief is hereby granted as follows:

(1) The "Modification and Restatement of Trust Agreement" dated May 21, 1997, the "Second Modification and Restatement of Trust Agreement" dated August 15, 1997, and all other wills, codicils, trust agreements, trust amendments, documents affecting powers of attorney, and other testamentary or trust documents signed by Laura J. Niles on or after January 1, 1997, are hereby declared NULL and VOID.

(2) The personal assets of Laura Niles and the assets held in trusts established by Laura Niles are hereafter governed by the provisions of the trust documents, wills, codicils, and other testamentary documents in effect as of January 1, 1997, except to the extent otherwise provided settlement agreements duly entered into and accepted by this Court in this matter.

(3) Geoffrey M. Parkinson is hereby reinstated ast the executor, trustee, and attorney-in-fact for Laura J. Niles, and he is hereby appointed guardian of Laura J. Niles, subject to being duly qualified by the Warren County Surrogate.

(4) Michael Selvaggi, Esq., is hereby discharged as temporary trustee and guardian of Laura J. Niles, and he is directed to submit an accounting within sixty (60) days of the entry of this order.

(5) In accordance with paragraph 8 of the consent order filed October 28, 1999, between plaintiffs, Edward Glynn, Esq., on behalf of the minors and Darryl Grosso, and Michael Selvaggi, Esq., the temporary trustee and guardian of Laura Niles, the Court hereby appoints Beacon Trust Company trustee of the trusts established thereunder and, by virtue of said appointment, relieves Geoffrey M. Parkinson of all duties and obligations as trustee for the trusts of the minors and Darryl Grosso arising from the prior Judgment entered on January 21, 2000. It is further ordered that upon the death of Laura Niles, the Surrogate shall pay out proceeds for the minors and Darryl Grosso, as directed by the consent order, to the trustee appointed herein, to be held in trust in accordance with the provisions of said consent order.

(6) A. Daniel D'Ambrosio, Esq., is hereby appointed to the Board of Directors of the Laura J. Niles Foundation, Inc. The Foundation shall take any and all steps necessary and proper to alter and/or amend the corporate papers to add M. D'Ambrosio to the Board of Directors, and to grant him full rights and privileges as a member of said Board.

(C) Fees, Costs, and Monetary Damages:

(1) A surcharge is assessed against Salvatore Bono in the amount of $805, 727, and is hereby final and immediately payable.

(2) In addition, Serena Niles is assessed a surcharge in the amount of $162, 014.

(3) In addition, Salvatore Bono and Serena Niles are jointly and severally liable to the Laura J. Niles Revocable Trust Created March 31, 1992, in the amount of $314, 282 for legal fees incurred in connection with this action.

(4) In addition, Salvatore Bono and Serena Niles are jointly and severally liable to the Laura J. Niles, for compensatory damages in the amount of $50,000.

E. This Amended Judgment shall and does he hereby supercede the Judgment previously entered in this matter on January 21, 2000.

F. A copy of this Order shall be served on counsel for all parties within 5 days of entry.

_____

Harry K. Seybolt, J.S.C.

**APPENDIX C**

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
WARREN COUNTY

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DOCKET NO: P-98-043d

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COHN LIFLAND PEARLMAN
HERRMANN & KNOPF, LLP
Attorneys for Salvatore A. Bono
Park 80 Plaza West One
Saddle Brook, New Jersey 07663
(201) 845-9600
Our File: 34, 405

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IN THE MATTER OF THE TRUST
CREATED MARCH 31, 1992 BETWEEN
LAURA J. NILES, GRANTOR, and
GEOFFREY M. PARKINSON, TRUSTEE;

TRUST CREATED MARCH 31, 1992,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE; and

AMENDATORY ORDER

TRUST CREATED AUGUST 23, 1994,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE.

---

THIS MATTER having been brought to the attention of the Court by Cohn Lifland Pearlman Herrmann & Knopf, LLP,

counsel for defendant, Salvatore A. Bono; and the Court having previously entered and Order dated September 21, 1999 granting "judgment by default" and the Court having considered the arguments of counsel and for other good cause shown:

IT IS on this 30th day of September, 1999;

ORDERED:

1. That this Court's Order of September 21, 1999 entering judgment by default against defendant, Salvatore A. Bono, is hereby vacated; and it further ordered

2. That the pleadings of Salvatore A. Bono are hereby stricken and default is entered against him pursuant to R. 4:23-2(b)(3); and it is further ordered

3. That a copy of this Order shall be served on all counsel within 5 days from the date hereof.

_____

HON. HARRY K. SEYBOLT, J.S.C.

**APPENDIX D**

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISIONS OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112
E-Mail: catinodon@law.dol.lps.state.nj.us
(609) 292-8150

November 29, 1999

Mr. Salvatore A. Bono, Pro Se
2227 86th Street
Brooklyn, NY 11214

Re: *Bono v. Barnosky, et al.*
C.A. No. 99-3688

Dear Mr. Bono:

This is to inform you that defendant Judge Harry K. Seybolt joins in the motion to dismiss your RICO allegations made by Farrell Fritz, P.C. on behalf of John J. Barnosky.

Thank you very much for your consideration.

Sincerely yours,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF
NEW JERSEY

By: _____
Don E. Catinello
Deputy Attorney General

c: All counsel of record
Clerk of the Court
The Honorable Thomas C. Platt, U.S.D.J.

## APPENDIX E

### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein

shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section??5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**APPENDIX F**

SUPREME COURT OF NEW JERSEY

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Docket No. 52, 881

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IN THE MATTER OF THE TRUST CREATED MARCH 31, 1992, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE;

TRUST CREATED MARCH 31, 1992, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE; and

TRUST CREATED AUGUST 23, 1994, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARLINSON, TRUSTEE.

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On Petition for Certification for review of a final judgment of the Superior Court of New Jersey, Appellate Division, Entered March 14, 2002

Sat Below:

Hon. David S. Baime, P.J.A.D.
Hon. Robert A. Fall,
Hon. Francine I. Axelrod, J.J.A.D.

---

PETITION FOR CERTIFICATION AND APPENDIX ON BEHALF OF DEFENDANT-PETITIONER SERENA NILES

---

JOSEPH P. CASTIGLIA, ESQ.
*Attorney for Defendant-Petitioner Serena Niles*
155 Polifly Road
Hackensack, New Jersey 07601
(201) 342-1700

not in conflict with any other decision of a similar or higher court, is consistent with ordinary principles of review, and neither offends justice nor common sense.

## CONCLUSION

Serena respectfully submits that for the reason set forth in her Petition, this Court should grant her Petition foe Certification and reverse the decision of the Appellate Division that decline to overturn that part of the trial court's judgment that set aside the intended devise of the real estate and imposed surcharges, fees and costs on her.

Serena also joins in those arguments presented by Bono in his Petition for Certification to the extent that they affect her.

Finally, Serena respectfully asks, for the reasons set forth, that this Court deny the Cross-Petitions for Certification.

Dated: April 26, 2002

Respectfully submitted,

/s/ Joseph P. Castiglia
JOSEPH P. CASTIGLIA, ESQ.
155 Polifly Road
(201) 342-1700

*Attorney for Defendant-Petitioner*

NOTICE OF PETITION FOR CERTIFICATION,
DATED APRIL 19, 2002

JOSEPH P. CASTIGLIA
Attorney at Law
155 Polifly Road
Hackensack, New Jersey 07601
(201) 342-1700
*Attorney for Petitioner/Appellant*
*Serena Niles*

---

SUPREME COURT OF NEW JERSEY
DOCKET NO. 52881

(APPELLATE DIVISION
DOCKET NO. A-4644-99-T1; NO. A-4649-99-T1)
Civil Action

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In the Matter of the
Trust Created March 31, 1992 between
Layra J. Niles, Grantor, and Geoffrey M.
Parkinson, Trustee;

Trust Created March 31, 1992 between
Laura J. Niles, Grantor, and Geoffrey M.
Parkinson, Trustee; and

Trust Cteated August 23, 1994 between
Laura J. Niles, Grantor, and Geoffrey M.
Parkinson, Trustee

# NOTICE OF PETITION FOR CERTIFICATION

TO: Clerk of the Supreme Court
Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 086250-0970

Clerk of the Appellate Division
Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0006

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MURRAY & KIMBALL, LLC
15 Warren Street
Hackensack, New Jersey 07601

PLEASE TAKE NOTICE that Serena Niles hereby petitions the Supreme Court of New Jersey for an Order certifying those portions of the judgment of the Appellate Division entered in the above matter on March 14, 2002, by which she is aggrieved. The filing fee of $175.00 is enclosed herewith.

Dated: Hackensack, New Jersey
April 19, 2002

/s/ Joseph P. Castiglia
JOSEPH P. CASTIGLIA
Attorney for Serena Niles

Nos. 02-1025 and 02-1038

MAR 10 2003

CLERK

IN THE

# Supreme Court of the United States

SERENA NILES,

*Petitioner,*

-and-

SALVATORE A. BONO,

*Petitioner,*

*v.*

GEOFFREY M. PARKINSON,
as Trustee of the Laura J. Niles Trust, and
THE LAURA J. NILES FOUNDATION, INC.,

*Respondents.*

**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a litigant in a matter pending before a state court judge can, by filing a meritless federal suit naming the state court judge as one among 23 defendants, and thereby requiring the state's attorney general's office to appear on behalf of the judge and obtain a dismissal of the federal suit, force the recusal of the state court judge at the risk of creating a viable due process claim.

2. Whether a writ of *certiorari* should issue in a case in which: (a) the petitioner did not raise, and the court below did not address, the questions presented in the petition; (b) the decision as to which the petitioner seeks review is an unpublished opinion with no precedential value from an intermediate state appellate court; and (c) the judgment below is not final as to all issues among the parties.

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## STATEMENT OF THE CASE

This is a story of extreme avarice and greed on the part of opportunists Serena Niles (hereinafter "Serena") and her son Salvatore A. Bono (hereinafter "Sal"), who sought to ravage the multi-million dollar estates of two physically and mentally infirm octogenarians.

The Laura J. Niles Foundation, Inc. (hereinafter "Foundation") is the remainder beneficiary of three inter-vivos trusts created by Laura J. Niles (hereinafter "Laura") between 1992 and 1994 of which Geoffrey M. Parkinson (hereinafter "Parkinson") was the trustee. Pa681a.[1]

Laura, a childless octogenarian who had never married, was the heiress to a $30 million fortune. Laura's younger brother, Henry E. Niles (hereinafter "Henry"), was likewise a never-married, childless octogenarian who was the heir to a similar size fortune. Parkinson was a life-long friend of the Niles family, as well as Laura's and Henry's financial adviser and the trustee of the trusts.

By the early 1990's, Henry was in physical and mental decline, to the point that he had become incontinent and had allowed himself to be swindled out of one million dollars by an unscrupulous broker. Because of this, a proceeding was commenced in New York state court to have his affairs placed in the hands of a conservator. Pa655a. Around the same time, Serena Bono (later Serena Niles), one of the owners of a

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1. For the purposes of this brief, references to the Appendix filed in the Appellate Division of the Superior Court of New Jersey on behalf of Geoffrey M. Parkinson will appear as "Pa__"; references to the Joint Appendix filed on behalf of Geoffrey M. Parkinson and The Laura J. Niles Foundation, Inc., will appear as "Ja__."

local restaurant who was approximately 30 years Henry's junior, began spending a considerable amount of time with him and subsequently announced that she would like to marry him. A temporary restraining order was entered in the conservatorship proceeding to prohibit the marriage from taking place while the matter was pending. Pa676a. Despite the restraining order, Serena married Henry in November, 1992. The conservator who was appointed in the New York proceeding sought to have the marriage annulled; however, that issue was resolved by the execution of a post-nuptial agreement limiting Serena's right to inherit from Henry's estate. Pa740a. (Following Henry's death, Serena sued to have the post-nuptial agreement set aside. That action eventually settled with Serena receiving millions.)

By 1997, Laura's health was in a fragile state; and she required daily nursing care. She had already been diagnosed as suffering from organic brain syndrome, rendering her cognitively impaired, particularly with respect to making personal and financial decisions. Parkinson, her long-time friend and financial advisor, was by then providing advice and services in that regard.

Serena, taking advantage of Laura's diminished capacity, began to insert herself into Laura's personal decision-making process and started a campaign of slander against Parkinson. About that same time, Serena's son Sal convinced Laura to meet with a law firm selected by him. The upshot was that in 1997 Laura signed a series of complex testamentary papers that made profound changes to her estate plan, including, *inter alia*, discharging Parkinson as her trustee and installing Sal in his place; revoking her Last Will and Testament and replacing it with an instrument making two million dollars in specific bequests to Sal's family, including his mother,

Serena; completely disinheriting the Foundation; and diverting the entire residuary estate to a new foundation controlled by Sal, Serena, and their business associates. Pa1019a-1092a.

Parkinson and the Foundation filed actions in the Superior Court of New Jersey, Chancery Division, Probate Part, Warren County, to invalidate the testamentary instruments executed by Laura in 1997 on the grounds that they had been procured through the undue influence of Serena and Sal. Pa1a, 371a, 394a. The presiding judge was the Honorable Harry K. Seybolt of the Superior Court of New Jersey. At an early point in the proceeding, Judge Seybolt appointed Michael S. Selvaggi, a Warren County attorney, to act on Laura's behalf as her guardian *ad litem*.[2, 3] Pa2a.

Parkinson and the Foundation ultimately prevailed in the trial court, which removed Sal as trustee, invalidated the 1997 testamentary papers thereby restoring Laura's prior Last

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2. On pages 10-11 of Serena's petition and on page 8 of Sal's, they claim that Parkinson had Mr. Selvaggi appointed through an *ex parte* proceeding with the court. That claim is patently false, and no evidence has ever been adduced to support it. Mr. Selvaggi was selected by the court. Parkinson, who lives and works in Connecticut, had never heard of Selvaggi prior to his appointment.

3. Serena and Sal also claim at pages 11 and 8, respectively, that 18 witnesses submitted affidavits stating that Selvaggi's report to Judge Seybolt misquoted them and falsified statements attributed to them. After our repeated and unanswered calls to produce the 16 alleged affidavits that are not in the record, counsel for Sal filed with this Court and served a notice of errata purporting to correct that misstatement, stating: "[a]t least two witnesses submitted . . . affidavits . . ." The fact of the matter is that *only* two such affidavits are part of the record or have ever been seen.

Will and Testament and the trusts, restored Parkinson as the trustee, and assessed damages against Serena and Sal. Pa498a, 550a. The judgment against Sal was ultimately by default. In his opinion, Judge Seybolt stated: "It is this Court's conclusion that there is no clearer case of undue influence than the one presently before this Court." Pa536a.

Judge Seybolt's decision to enter default against Sal was made after a full year of rampant and unrepentant litigation abuses by Sal — conduct that included defiance of court orders, refusal to provide crucial discovery, and, ultimately, failure to appear at trial. Ja97a-110a. Some of the "highlights" of Sal's misbehavior during the litigation include his:

- Sending a series of *pro se* letters to the trial court teeming with factually baseless and highly tendentious accusations of "corruption" and "bias" against his adversaries, his own lawyers, and Laura's court-appointed guardian *ad litem*. Pa304a, 315a, 319a.

- Refusing to furnish "family videotapes" of Laura, which he admitted existed and which would have been relevant to the trial court's findings of fact concerning Laura's mental capacity.

- Walking out of the hearing on his accounting for his service as Laura's fiduciary after two and a half days of evasive and unresponsive testimony. Ja115a. Sal simply walked out of the proceeding, never to return. Instead, he filed a 303-page "RICO" complaint in the United States District Court for the Eastern District of New York, naming as defendants

the attorneys for Serena's adversaries in the New York litigation concerning Henry's estate; all of the attorneys representing adversaries in the New Jersey action; court appointed individuals in both the New York and New Jersey actions; discharged attorneys who had previously represented him in the New Jersey action; and various court officials — most notably, Judge Seybolt. Pa417a, Ja69a.

- Moving in the trial court for Judge Seybolt to recuse himself on the basis of Sal's having named him a defendant in the RICO action. Ja96a.

The RICO action was dismissed in a 42-page Memorandum and Order entered by United States District Judge Thomas C. Platt.[4] Pa570a. Judge Seybolt was represented in that action by the New Jersey Attorney General's office, which moved for dismissal on the basis of judicial immunity and merely sent a letter to the court adopting the arguments of the other defendants moving for dismissal on the merits of the RICO action. With respect to Sal's specific claims against Judge Seybolt, Judge Platt ruled that the United States District Court lacked subject matter jurisdiction and was without authority to review decisions as to state court proceedings pursuant to the *Rooker-Feldman* Doctrine, as well as the Eleventh Amendment to the United States Constitution. Pa583a-587a. Further in his opinion, Judge Platt stated that Judge Seybolt was absolutely immune from Sal's allegations based on the doctrine of judicial immunity. Pa605a-606a. While discussing the Abstention Doctrine as another reason

4. Serena was never a party to the RICO action.

for dismissing Sal's claims against Judge Seybolt, Judge Platt stated: "Plaintiff does not allege facts which support his claim that Judge Seybolt is biased against him, but rather his only basis for this charge is the existence of rulings adverse to his position in the New Jersey action." Pa587a. Sal took no appeal from that dismissal.

Serena and Sal appealed Judge Seybolt's decision to the Appellate Division of the New Jersey Superior Court (hereinafter "Appellate Division"), arguing, *inter alia*, that Judge Seybolt was biased against them. In doing so, they relied on the New Jersey Code of Judicial Conduct, the federal recusal statute, and New Jersey Court Rules. They never raised the issue of Fourteenth Amendment violations. Parkinson and the Foundation cross-appealed on issues of damages. The Appellate Division affirmed Judge Seybolt's judgment in its entirety, noting in its opinion that: "The trial judge exercised remarkable restraint throughout and displayed a clear and constant intent to provide Salvatore ample and adequate opportunity to be heard."

Serena and Sal then petitioned the New Jersey Supreme Court for certification of the issues that had been appealed to the Appellate Division. Parkinson and the Foundation cross-petitioned on issues of damages. The New Jersey Supreme Court denied Serena's and Sal's petitions but granted Parkinson's and the Foundation's cross-petition. Oral argument is scheduled to take place on March 17, 2003.

Neither Serena nor Sal posted a *supersedeas* bond with the trial court to stay execution of the judgment during the appellate process. Accordingly, the judgment was domesticated in New York, where both Serena and Sal are

residents. Execution was effected against Serena for the amount for which she was adjudged liable. Sal, on the other hand, has appealed an order of the Supreme Court of the State of New York, Kings County, that amended a prior order of that court to reflect properly the damages levied against him by Judge Seybolt (App. A1); and the matter is now before the Appellate Division of the Supreme Court of the State of New York, Second Department (App. A4).

For a more exhaustive recitation of the facts of this case, the Court's attention is respectfully invited to the *per curiam* opinion of the Appellate Division at pages A3 through A75 of Salvatore A. Bono's petition.

## REASONS FOR DENYING THE PETITIONS

The petitions for writ of *certiorari* should be denied for three discrete reasons.[5]

### A. *Certiorari* Is Unwarranted Because Neither the Record nor the Decision Below Raise or Address the Questions Presented by the Petitions.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the general rule that it will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that

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5. Although the issue of whether or not the trial judge should have recused himself is best left to a merits brief, we are obligated to point out that the petitioners rely on *Republic of Panama v. American Tobacco Co., Inc.*, 217 F.3d 343 (5th Cir. 2000) in support of their arguments for recusal. This Court reversed that case *sub nom.*, *Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co.*, 535 U.S. 229 (2002).

rendered the decision for which the petitioner seeks review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). If the highest state court was silent on the federal question presented to this Court, the assumption is that the issue was not properly presented below. *Id.*; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983).

Serena never raised the issue of due process in her appeal to the Appellate Division or in her petition for certification to the New Jersey Supreme Court. The sole issues that she raised in those courts were: (1) that she should not have been stripped of a condominium in Florida that the trial court found she had acquired from Laura as a result of undue influence; and (2) that she should not have been assessed surcharges, fees, and damages by the trial court. Neither her appeal nor her petition in the New Jersey state courts ever mentioned an issue with which this Court should be concerned.

In his appeal to the Appellate Division and in his petition for certification to the New Jersey Supreme Court, Sal mentioned the "Fourteenth Amendment" and made vague claims of his being deprived of "due process rights" as the result of adverse rulings by the trial court. Other then complaining that New Jersey law was being misapplied, he did not mention or argue that the trial court's rulings were unconstitutional under the Due Process clause. As this Court stated more than 40 years ago: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity *** of judicial decisions *** (or) immunity from judicial error ***' [Citation omitted.] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 554-55 (1962).

Significantly, the Appellate Division did not address Sal's vague utterances concerning "due process"; and the New Jersey Supreme Court denied his petition for certification. It must therefore be assumed that he did not present the issue properly. *Adams v. Robertson*, *supra* at 86; *see also*, *Crowell v. Randell*, 35 U.S. 368 (1836), wherein Justice Story stated:

> In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails.

*Id.* at 392.

This Court, in exercising its appellate jurisdiction, will consider questions not pressed or passed upon in the courts below only in exceptional cases *that come from the federal courts*. *McGoldrick v. Companie Generale Transatlantiqe*, 309 U.S. 430, 434 (1940). This case, of course, comes from the New Jersey state courts. This Court should therefore not depart from this practice in the exercise of its appellate jurisdiction.

**B. *Certiorari* Is Unwarranted Because the Petitioners Seek Review of an Unpublished Opinion of an Intermediate State Appellate Court That Has No Precedential Value.**

New Jersey Court Rule 1:36-3 provides in pertinent part: "No unpublished opinion shall constitute precedent or be binding upon any court." Accordingly, other New Jersey courts considering issues similar to those below may possibly reach different conclusions, especially since the finding of undue influence on the part of Serena and Sal turned so much on issues of fact.

"Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easely v. Cromartie*, 532 U.S. 234, 242 (2001). The Appellate Division affirmed the judgment of the trial court only after an exhaustive review of the trial court's factual findings. The petitioners have not presented reasons why this Court should revisit those findings.

Given the fact intensity of the issues of which the petitioners complain and the absence of precedential effect of the decision below upon any other case or controversy, there is no reason why this Court should grant *certiorari*.

### C. *Certiorari* Is Unwarranted Because the Judgment Below Is Not Final as to All Issues Among the Parties.

This Court's ability to review state court decisions is limited to final judgments rendered by the highest court of that state. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 77 (1997). This principle serves the purpose of preventing piecemeal review of state court decisions. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). All rights must be fully adjudicated, and the adjudication should not be subject to further review by a state court. *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942). "[T]he rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920).

The rights and obligations among the parties to this case are currently under review in the appellate courts of two states. The cross-appeal of Parkinson and the Foundation on issues of damages is currently before the New Jersey Supreme Court and scheduled for oral argument. Following the domestication in New York of the judgment of the New Jersey trial court, Sal has appealed the amount of the New Jersey judgment to the Appellate Division of the New York Supreme Court.

Given his history in these proceedings, it is likely that Sal will again petition this Court to review the matters currently under consideration by the New Jersey and New York appellate courts should they rule against him. Likewise, if Serena remains true to form, she will follow suit.

Accordingly, neither petition is ripe for *certiorari*.

## CONCLUSION

The petitions for a writ of *certiorari* should be denied.

Respectfully submitted,

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**APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS DATED AND FILED JULY 11, 2001**

At an IAS Term, Part 44 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of July, 2001.

PRESENT:

HON. L. PRISCILLA HALL,

Justice.

Index No. 26439/00

GEOFFREY M. PARKINSON,
Trustee of the Laura J. Niles Trusts,

Plaintiff,

-against-

SALVATORE BONO,

Defendant.

Upon the foregoing papers, the plaintiff seeks an order of this court, pursuant to CPLR 5019, modifying the foreign judgment entered against the defendant on August 2, 2000 in the amount of $526,296.00 to reflect the correct judgment amount of $805,727.00, plus simple interest at a rate of five

percent, as set forth in the March 24, 2000 Amended Judgment issued by the Honorable Harry K. Seybolt, Judge, Superior Court of New Jersey, Chancery Division, Warren County, Probate Part.

Defendant opposes the motion contending that the proposed amendment of the order will affect his substantive rights in violation of CPLR 5019, because it will increase the judgment by nearly fifty percent. Further, defendant contends that the plaintiff has no standing, that the foreign judgment is unclear on critical issues, that the motion papers are unsupported by an affidavit of personal knowledge and that the plaintiff has not presented good cause or statutory authority for the relief sought.

This court finds the order of Judge Seybolt to be clear on its face. The amendment, rather than affecting defendant's substantive rights, simply affirms the amount which he was ordered to pay to the plaintiff in Judge Seybolt's order. The issue of standing was determined in favor of the plaintiff in this court's previous decision and the motion papers are sufficiently supported by the affidavits which are contained therein. The plaintiff has demonstrated that the amount of the judgment entered against the defendant on August 2, 2000 was incorrect and that modification to reflect the correct amount is appropriate.

The plaintiff's motion modifying the foreign judgment entered against the defendant on August 2, 2000 in the amount of $526,296.00 to reflect the correct judgment amount of $805,727.00, plus simple interest at a rate of five percent, as set forth in the March 24, 2000 Amended Judgment issued

by the Honorable Harry K. Seybolt, Judge, Superior Court of New Jersey, Chancery Division, Warren County, Probate Part is granted. The entry of this judgment against the defendant, Salvatore Bono, is without prejudice to the right of plaintiff, as Trustee of the Laura J. Niles Foundation to seek recovery in the future of further monies from defendant, Salvatore Bono, depending upon the final outcome of the pending appeal of Serena Bono-Niles from the Amended Judgment of the New Jersey Court.

The following constitutes the order, decision, and judgment of the court.

ENTER

Hon. L. Priscilla Hall
J.S.C.

**APPENDIX B — NOTICE OF APPEAL OF THE DEFENDANT SALVATORE BONO TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED SEPTEMBER 12, 2001 AND FILED SEPTEMBER 13, 2001**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index Number 26439/00

GEOFFREY M. PARKINSON,
Trustee of the Laura J. Niles Trusts,

Plaintiff,

SALVATORE BONO,

Defendant.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the defendant Salvatore Bono appeals to the Appellate Division of the Supreme Court, Second Department, from the order of the Supreme Court, Kings County (L. Priscilla Hall, *J.*) dated July 11, 2001, and entered in the office of the clerk of Kings County on July 31, 2001. The order was served with notice of entry on August 13, 2001. Defendant appeals from each and every part of the order and the whole thereof; both on questions of law and fact.

*Appendix B*

DATED: New York, New York
September 12, 2001

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